IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION **AC 21 of 2011**

NUKU'ALOFA REGISTRY **[CV 193 of 2010]**

BETWEEN: **APEX INSURANCE BROKERS LTD**

- Appellant

AND : **SAMIPENI FINAU**

- Respondent

Coram : **Salmon J**

Moore J

Handley J

Counsel : **Mr. Edwards for the Appellant**

Mr. T. Fifita for the Respondent

Date of hearing : **3 October 2012**

Date of judgment : **12 October 2012**

JUDGMENT OF THE COURT

[1] This is an appeal from a judgment on 2 September 2011 which dismissed the appellant's application dated 28 June 2011 to set aside the interlocutory judgment for damages to be assessed, in default of a defence, entered on 11 December 2010, and the assessment of the plaintiff's damages on 6 June 2011.

[2] The proceedings arose out of a policy of fire insurance issued by the appellant to the respondent on 9 December 2009 covering the respondent's retail store at Nualei for $40, 000, and his stock in trade there to a value of $160, 000.

[3] On 28 December the premises were totally destroyed by fire.

[4] The respondent made a claim under his policy which the appellant rejected.

[5] The respondent commenced proceedings in the Supreme Court on 23 September 2010, and according to the certificate of service on the file, the writ, statement of claim and directions notice were served on the appellant at its office at Nuku'alofa on 30 September.

[6] The writ notified the appellant that if it wished to defend the claim it must file a written defence within 28 days. Under the procedure in the Supreme Court a defendant is not required to file and serve a notice of appearance otherwise than in its defence.

[7] The appellant did not file and serve a defence within time and on 5 November the respondent filed an ex parte application under the Rules for judgment in default of defence.

[8] On 11 November the primary judge entered judgment for the respondent for damages to be assessed and directed service of his

order on the appellant within 14 days of the issue of the order and service of the respondent's bill of costs.

[9] According to the certificates of service on the file the appellant was served with a copy of the default judgment on 16 November and on 7 December it was served with the respondent's itemised bill of costs claiming $2735.

[10] On 26 May 2011 the assessment of the respondent's damages was heard ex parte by the primary judge and judgment was reserved. This was delivered on 6 June when the respondent was awarded $200, 000 with interest at the rate of 10% from 28 May 2010.

[11] According to the respondent's affidavit of 24 August 2011 the appellant was served with a copy of the final judgment on 10 June 2011.

[12] Service of this judgment finally stirred the appellant into action, and on 28 June it filed an application under Order 14 r. 4 to set aside the judgment in default of defence, and the assessment of the respondent's damages, supported by a 5 page affidavit of Peseti Ma'afu its General Manager with 10 pages of annexures.

[13] The respondent filed a notice of opposition on 26 August, supported by an affidavit of the respondent of 24 August. The application was heard by the primary judge on 30 August. His reserved judgment, dismissing the application but granting a stay of execution, was delivered on 2 September 2011.

[14] In his affidavit Mr. Ma'afu said that he was not aware that a defence had not been filed, that he had engaged a named lawyer to act for the appellant and to file a defence, that for some reason not known to him a defence had not been filed. He became aware of the default judgment when the judgment of 6 June 2011 was served upon him.

[15] He continued "I cannot say with any certainty as to why the defence was not filed in time, nor can I ascertain why judgment was granted, when at all material times it was the intention of the Defendant to file a defence." He added that he had gathered "sufficient evidence in this case prior to judgment being ordered on 6 June 2011 that questions the validity of the Plaintiff's claim."

[16] The last statement is clearly correct in view of the information in his affidavit and the documents annexed to it.

[17] The primary judge noted the submission of counsel for the respondent that the appellant "though served with all relevant papers and orders, took no part in the proceedings until 3 weeks after judgment had been delivered." This of course was perfectly true as the history of the proceedings demonstrates.

[18] The primary judge also noted that on the appellant's case the failure to file a defence was the result of its previous legal adviser's failure to follow instructions; that the respondent had insured the same property with another office which would avoid both policies, that there was an action pending against the other insurer, and this claim was fraudulent.

[19] The respondent admitted in his affidavit of 24 August that he had also insured the property with Dominion Insurance, but the sum insured and the amount claimed by the respondent in his then pending action against that Company does not appear.

[20] The primary judge referred to his judgment on the ex parte assessment when as he said, he "expressed some doubts about the Plaintiff's credibility." Later in his judgment of 2 September 2011 he said "The Plaintiff's claim against this Defendant and the admitted fact that he has also insured elsewhere give rise to disquiet."

[21] In his judgment in the assessment the primary judge had noted that the respondent calculated his stock losses at $514, 847.94. The judge recorded that the respondent had not offered "any supporting evidence" in his case in chief. In answer to questions from the Court a handwritten stock list (Ex 3) was produced covering half the respondent's loss despite the document concluding with a "grand total" of $365, 733. 27.

[22] In answer to a request for supporting evidence a bundle of invoices was produced. The judge said that "Comparison of these invoices with Exhibit 2 [a typographical error for Exhibit 3] revealed immediate anomalies. The invoices "bear all the signs of having been prepared on the same day. The serial numbers are inconsistent with their dates."

[23] The judge continued: "The Plaintiff's attempts to explain to me why he had, according to the invoices, purchased several items of stock when, according to earlier invoices he must have had very large amounts of the items already in stock did not impress me." He said that the plaintiff's explanation that he had stocked up for the busy Christmas and New Year period only made his claim to have lost stock worth $514, 847.94 in the fire on 28 December, after the Christmas rush, "all the less plausible".

[24] The judge concluded by recording that he was not "very favourably impressed by the Plaintiff's evidence", and he suspected that the claim "was inflated", but nevertheless gave judgment for the sum insured.

[25] Additional information in Mr. Ma'afu's affidavit makes the respondent's claim to have lost stock worth $514, 847.94 even more incredible.

[26] A valuation of the building dated 24 September 2007 showed that the ground floor shop was only 12 meters by 5 meters. Mr. Ma'afu noted the existence of a shop counter and the presence of refrigerators and

said that the stock allegedly lost in the fire "could not possibly fit into the small size of the store."

[27] The statement of claim (para 13) alleged that the plaintiff had an overdraft of $115,000 from the ANZ Bank "which purchased" goods that were destroyed in the fire. In the course of investigating the respondent's claim the appellant obtained copies of the respondent's bank statements with the ANZ Bank covering the period from early September to 31 December 2009. The respondent's overdraft at the start of the period was $39.054.61 and at the end was $121,145. 90.

[28] Mr. Ma'afu stated that the withdrawals and cheque payments shown in the statements "do not follow the amounts purchased from the invoices…submitted". For instance the respondent provided a carbon copy invoice dated 4 November for stock to the value of $241, 384 including 800 50kg bags of sugar ($ 54,400), 350 cartons of tomato ketchup ($19,600), 850 25kg bags of flour ($29,750), 1500 cartons of soft drink ($25,500), and 500 cartons of Mortein ($27,000).

[29] It is highly unlikely that the respondent could have obtained stock on credit to this value, but the bank statements reveal no cheque for this amount, and Mr. Ma'afu stated that the withdrawals from the ANZ account totalled $18,118.18 in October, $85,857.07 in November and $18,054.74 in December.

[30] During this period the respondent's overdraft which fluctuated between $39,054.61 in early September and $38,248.74 on 16 November (AB 62) increased to $121,145.90 at the end of December.

[31] The bank statements contain no debit entry for more than $4,000 until a debit of $5,000 on 18 November 2009 and then debits of $10,000 on 19, 20 and 27 November. Thereafter there were withdrawals of $7,500

for a loan repayment, a cash withdrawal of $6,500 on 7 December but all other withdrawals were for amounts of $3,750 or less.

[32] On their face, the ANZ bank statements contradict the respondent's claim to have lost stock to a total value of $514,847.94 in the fire, and in particular they contradict the copy invoice for $241,384 dated 4 November.

[33] These matters may be capable of explanation. The respondent said in his affidavit in opposition to the application to set aside the judgment that his building had been extended before the fire and was three or four times bigger. He also said that the money he used to buy goods also came from the Westpac Bank. However the statement of claim only referred to goods purchased with money from the ANZ Bank, and the Westpac statements were not produced.

[34] The respondent filed a further affidavit in this Court dated 27 September 2012 but no further explanation was offered for the inconsistencies noted by the primary judge or those relied on by Mr. Ma'afu, and the Westpac statements were not produced.

[35] A further difficulty with the respondent's claim hinted at by the primary judge, is that the respondent's evidence that stock to the total value of $514,847.94 was destroyed in the fire was based on what were said to be his total purchases over the period from 16 July 2009 to 16 December 2009 including one invoice in September and four in October, making no allowance at all for his sales during this period.

[36] The appellant's purchases, for which he produced invoices from wholesalers, totalled only $77,903.93. The highest amount in any of these invoices was $16,110. None of the attached invoices referred to terms of credit, and those from Punjas and Pactrade stated that they were cash sales. The respondent could produce what appeared on their

face to be genuine original invoices from wholesalers for goods to the value of $77,903.93, but could not produce such documents for purchases to the value of $241,384 from unidentified wholesalers.

[37] The respondent in his affidavit of 24 August 2011 offered no explanation for having invoices to support a claim for $77,903.93 but no explanation, except a carbon copy, to support his claim to $241,384. The explanation in his later affidavit of 27 September 2012 was that "the originals" were destroyed in the fire, and the wholesale stores could not find copies to give to him for the trial. However he had what appeared to be original invoices for $77,907.97.

[38] The evidence available to this Court raises a prima facie case that the respondent's claim in Court that the stock to the "grand total" of $365,733.27 (Exhibit 3 not in the appeal booklet) and his claim under the policy for $200,000 were grossly exaggerated and fraudulent.

[39] Proof by an insurer that a claim by its insured was fraudulent leads to the forfeiture of the entire claim including the residue which may be genuine: *Manifest Shipping Co Ltd v Universal Polaris Insurance Ltd* [2003] 1 AC 469. There is in addition the appellant's claim that, in answer to a specific question when he was seeking cover from the appellant, the respondent denied having other insurance on the property. Proof of another policy with Dominion Insurance is said to avoid the appellant's policy independent of any non-disclosure or misrepresentation. In any event there is a genuine dispute as to the true value of the respondent's claim which may be considerably less than $200,000.

[40] Clearly there are a number of serious issues to be tried, and a prima facie case of fraud.

[41] In his judgment of 2 September 2011, the primary judge did not refer expressly to the criterion in O 14 r 4 of the *Supreme Court Rules* which identifies the matters about which the Court should be satisfied before setting aside a default judgment. This rule provides:

> "(1) A judgment entered under rule 1 may be set aside if the defendant satisfies the Court that:
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> (a) there was good reason for the failure to file a defence in time;
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> (b) there is an arguable defence; and
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> (c) the plaintiff will not suffer irreparable injury if the judgment is set aside.
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> (2) Application notice under paragraph (1) shall be supported by an affidavit."

[42] Ordinarily the Court would consider the criteria identified in the rule before determining whether the judgment should be set aside. The rule contemplates that each criterion must be satisfied.

[43] In dismissing the application to set aside the default judgment the primary judge explained:

> *In my opinion the Defendant has advanced no good reason for setting the judgment aside, and for ignoring the proceedings pending against it (see e.g.* Currie v Tokoroa Earthmovers Ltd *[1960] NZLR 611,614). On the other hand, the Plaintiff's claim against this Defendant and the admitted fact that he has also insured elsewhere give rise to disquiet.*

[44] The first sentence in the passage from the judgment quoted earlier could fairly be viewed as addressing the question of whether there was a good reason for Apex failing to file a defence in time. The primary judge uses the expression "no reason" and the New Zealand authority referred to concerns a case where lawyers had failed to act.

[45] The case of *Currie v Tokoroa Earthmovers Ltd* cited by the primary judge in the passage quoted earlier (there appears to be a typographical error in that the year in the citation should be 1966 not 1960) is the judgment of Woodhouse J of 17 December 1965. That judgment was, in fact, the subject of an appeal to the Court of Appeal whose judgment is reported at [1966] NZLR 989. The judgment of Woodhouse J was relied upon by Ford ACJ in *MBf Bank v Mangisi* (2005) Tonga LR 397 in refusing to set aside a default judgment (on an application made over 2 years later) in circumstances where the explanation for failing to file a defence was a generalised allegation that two solicitors, who had been asked to file a defence, had failed do so.

[46] The case of *Currie v Tokoroa Earthmovers Ltd* concerned a case where the plaintiff, a "somewhat unsophisticated and elderly farmhand", had been injured in a motor vehicle accident and retained solicitors to commence proceedings on his behalf. The limitation period for commencing such proceedings was two years. A writ was filed on the last day of that period but not served within the ensuing 12 months, as it should have been. Woodhouse J found that during the two-year period:

> "*the plaintiff made a numbers of enquiries from his solicitor as to the progress being made with his intended action, and it is clear that on each of these occasions he was given some sort of assurance that his interests were being watched and that the matter was progressing slowly*."

His Honour also found that similar enquiries were made and responses given after the writ was filed.

[47] His Honour made two observations relevant to this matter. The first was:

> *In general a party cannot disclaim responsibility for the acts of a solicitor appointed to act for him.*

The second concerned a particular category of potential litigant who:

> *Having given some broad instructions to a solicitor, is then content to lie back for an extended period of time leaving everything with nonchalant confidence to his professional adviser*

[48] Woodhouse J concluded that the cause of the delay in that case should not be attributed to the plaintiff at all. His Honour granted leave to bring the proceedings out of time. The overriding requirement was that leave should not be granted unless the Court thought it was "just" to do so.

[49] Each of the three judges of the Court of Appeal published separate reasons and each generally agreed with the approach of Woodhouse J. They emphasised that each case had to be decided on the particular facts. However they adverted to situations where the solicitor had been inactive as had been the client. In such a case the client might be said to have "inexcusably slept on his rights". That was to be contrasted with the facts of that particular case, where the client had been active notwithstanding the inactivity of his solicitors.

[50] In the present case the evidence only discloses that Apex, at some stage, retained a lawyer to act for it and nothing was done by the lawyer to defend the proceedings. There is no evidence to suggest Apex took any steps itself to ascertain, from time to time, the progress of the matter and, in particular, what the lawyer had done. It is surprising that an insurance company, having rejected a claim which was arguably fraudulent and faced with a suit by the disaffected insured, would not monitor what was happening in the litigation. Apex was in the category described by Woodhouse J in the second passage set out above.

[51] It was open to the primary judge, in the exercise of a discretionary power, to conclude that Apex had not established a good reason for its failure to file a defence in time.

[52] However this is not the end of the appeal. Order 14 r.4 permits a default judgment to the set aside on proof of the matters referred to in the rule. It does not purport to prohibit setting aside in other circumstances, for example in the exercise of the Court's inherent jurisdiction.

[53] *Halsbury's Laws of England (4th Edition) Volume 37: Practice and Procedure* states the relevant principles in paragraph 14

> "…the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the Court…within the term 'inherent' is that which enables it to fulfil itself, properly and effectively as a Court of law…it may be exercised even in circumstances governed by rules of Court…the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as…a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".

[54] Courts have exercised their inherent jurisdiction to set aside default judgments in a number of situations referred to in *Halsbury* (above) at paragraphs 38 n.10 and 403 n. 8. To the cases there referred to can be added *Taylor v Taylor* (1979) 143 CLR 1 where the High Court of Australia exercised the inherent jurisdiction of the Family Court to set aside ancillary orders in an ex parte decree nisi in circumstances where as Gibbs J said at p 3

> *"The appellant promptly consulted his solicitors and instructed them to defend the petition. Through their neglect no answer was filed, and the appellant was never informed of the date fixed for the hearing of the petition."*

Gibbs J said at p. 5 that *"the real ground on which application was made to set aside [the orders] was that the party affected by it had not been given an opportunity to present his case."* The inherent jurisdiction of the Court was referred to by the judges at pp7, 8, 10, 16, and 22.

[55] There is no good reason why this aspect of the inherent jurisdiction should not extend to setting aside a default judgment to enable a trial on the merits where there is a prima facie case of fraud and a substantial sum is involved.

[56] In *Evans v Bartlam* [1937] AC 473, 480 Lord Atkin said, in the context of Order XXVII r. 15 which gave the Court a discretion, untrammelled in terms, to set aside default judgments:

> "The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that…there must be an affidavit of merits…It was suggested…that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default…I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court has regard. If there was a rigid rule…the two rules [of Court] would be deprived of most of their efficacy…Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be

departed from. The supposed second rule does not in my opinion exist."

[57] Lord Atkin also said at p. 480

> *"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

[58] Lord Wright said in the same case at p. 489

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."*

[59] Lord Atkin's statement of principle quoted in paragraph 58 was recently reaffirmed by the Privy Council in *Strachan v The Gleaner Co. Ltd* [2005] 1 WLR 3204, an appeal from Jamaica, in the judgment of Lord Millett at p. 3211. In that case the Courts in Jamaica had set aside a judgment in default of defence for damages to be assessed, after the assessment had taken place. The plaintiff's appeal to the Privy Council was dismissed.

[60] A further relevant factor is that the Supreme Court has jurisdiction, in a properly pleaded action, to revoke a judgment that has been obtained by the fraud of the successful party by perjury or otherwise, even after a trial on the merits: *Jonesco v Beard* [1930] AC 298, 301. This jurisdiction enables the Court to set aside a default judgment: *Wyatt v Palmer* [1899] 2 QB 106 CA. In our opinion this is another reason for exercising the inherent jurisdiction in this case.

[61] There is a further reason. The primary judge granted the appellant a stay of execution for 3 months. Mr. Ma'afu referred, in support of the appellant's alternative application for a stay, to the proceedings pending against the other insurer. He sought a stay to avoid double recovery if the respondent succeeded in that case, and if he failed "as a matter of fairness and justice the judgment in this matter could not stand where the Plaintiff would be seen to have obtained judgment by fraud."

[62] The Court has been informed that the case against the other insurer has been settled for $10,000, a modest amount in the circumstances.

[63] The primary judge in granting the stay must have contemplated that the judgments might later be set aside or amended in some way.

[64] The appeal should be allowed, the orders of the primary judge should be set aside, and in lieu thereof orders should be made setting aside the default judgment of 11 November 2010, and the ex parte assessment of the respondent's damages of 6 June 2011. The appellant should be ordered to file its defence within 28 days.

[65] The appellant must pay the respondent's costs of the proceedings in the Supreme Court up to and including the delivery of judgment on 2 September 2011 and there should be no order as to the costs in this Court.

[66] It is to be hoped that these orders for costs will bring home to the appellant, other insurance companies and other large businesses, the need to carefully and continually monitor the cases they bring and the cases brought against them. The order for costs will also emphasize the need for appropriate systems and staff training to ensure that Court documents received by junior staff are promptly referred to senior management.

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Salmon J

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Moore J

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Handley J