REEF PACIFIC (Sydney) PTY LIMITED AND OTHERS -v- REEF PACIFIC TRADING LIMITED AND OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 246 of 1991
Hearing: 24 November 1993
Judgment: 27 January 1994

Michael Rafter for Defendants
T. Kama for the Plaintiff

PALMER J: This is an application to set aside a judgement in default obtained on or about the 23rd of April 1992 pursuant to Order 29 Rule 12 of the High Court (Civil Procedure) Rules, 1964.

Several grounds have been put forward in support. The crucial ground is that there must be a defence on the merits.

The first point raised by Mr Rafter, Counsel for the Defendants, in support, is that the agreement relied on by the Plaintiff's in their statement of claim was purportedly made by a company which did not exist at the time of signing. Therefore it is submitted by the Defendants that at the time the agreement was signed, there was no legal person in existence.

The agreement was purported to have been signed on the 24th of January 1991. A copy of that agreement is affixed to the affidavit of Joann Marie Meiners, filed on the 16th of September 1993 and marked 'exhibit A'.

In support of this point, it was deposed to in Joann Marie Meiners affidavit, filed on the 16th of September 1993, at paragraph 18, in which reference was made to another affidavit of Gregory Clive Parr, filed on the 2nd of December 1991, and a copy of which is attached, and marked 'exhibit 1'. Annexed to Gregory Clive Parr's affidavit, are exhibits of searches that he did inrespect of the company, Reef Pacific (Sydney) Pty Limited. This company is one of the purported signatories to the agreement of January 24 1991. The common seal of the company is attested to by Graeme Price and Rosa Price.

In the exhibits annexed to Gregory Clive Parr's affidavit, it is revealed that the company was registered on the 3rd of December 1990. The name of the company was to be used with effect from 6/3/91. Further, it was shown that the directors were, Barbara Joy Cole and Geoffrey Arthur Cole. It was submitted that there was no evidence however, from the searches done, that Graeme Price and Rosa Price were as at the 24th of January 1991, directors of Reef Pacific (Sydney) Pty. Limited.

Mr Kama however submits that to say that there was no legal entity in existence on the 24/1/94 was incorrect. He also explained that the notification to change the office holders had already been lodged on the 31/12/90, but was processed late, on the 22/04/91. However, it was to be made effective from the 31/12/90 and therefore, there was no fraud involved in the signatures of the two directors, Graeme Price and Rosa Price.

I accept that the company Reef Pacific (Sydney) Pty Limited was registered on the 3rd of December 1990. Prior to this the company was known as Lawnbit Pty Limited with a registration No. 487837-30. On the 3rd December 1990, that number was changed to 050331 023.

Mr Kama submits that the application for reservation of a new name inrespect of Reef Pacific (Sydney) Pty Limited had been made way back on the 18th of October 1991.

The search documents also reveal that the former directors of the Company, Lawnbit Pty Limited were the new directors of Reef Pacific (Sydney) Pty Limited. these were Barbara Joy Cole and Geoffrey Arthur Cole, and were appointed also, on the 3rd of December 1990. I am satisfied that prior to the 24th of January 1991, the company, Reef Pacific (Sydney) Pty Limited, was already in existence, and was a legal entity.

On the 31st December 1990, a form, 304A, being 'Notification of Change to Office holders of Australian Company was lodged to the Australian Securities Commission. That document was processed on the 22nd April 1991, however, it was specifically provided, that the change was to be effective from the date of filing, being, the 31st December 1990. No copy of that form 304A has been produced from the search. Mr Kama has submitted that this change was in favour of Rosa Price and Graeme Price. No evidence to the contrary has been submitted to challenge this. On the balance of probabilities, I am not satisfied that Rosa Price and Graeme Price were not the directors of Reef Pacific (Sydney) Pty Limited as on the 24/1/91 and therefore were not duly authorised to attest the common seal of the company.

There is insufficient evidence to show that the company, Reef Pacific (Sydney) Pty

Limited, did not consider itself bound by the agreement as at the 24th January 1991, or as soon thereafter as Rosa Price had executed the document. There is insufficient evidence to show that if Rosa Price and Graeme Price were not the directors of Reef Pacific (Sydney) Pty Ltd as at the 24/1/91, that the directors of the company, whoever they may be can verify, that the company is not bound, by the agreement of the 24/1/91.

On the whole and with respect, I am not satisfied that sufficient evidence is disclosed to enable me to view this submission as a triable issue, and this submission accordingly fails.

The next ground raised is that it was fraudulently represented that the agreement was a draft agreement. It was then fraudulently altered, and Wolfgang Meiner's signature on the minutes of a meeting held on the 22nd of January 1991 forged.

On the question of fraudulent representation, it is submitted that the Defendants were induced into signing the draft Agreement on the condition that it would not and could not be binding until the Company's Solicitors, Lee Turnbull & Company in Townsville had perused, approved, formalised, registered and duly stamped the Agreement.

In the affidavit of Joann Marie Meiners filed on the 16th of September 1993, at paragraphs 17, 18 - 33(a)(b) and (c), it was deposed to, that the agreement of the 24th January 1991 was not binding until it had been seen and approved by the Defendant's Solicitors, Messrs, Lee, Turnbull and Company, Townsville.

In the affidavit of Wolfgang Meiners, filed also on the 16th of September 1993, at paragraph 2(a) it was deposed to that "...the Defendants were induced to sign a Draft Agreement to give substance to Graeme Price as he had borrowed funds from one Michael Roberts clients..."

At Paragraph 2(b) it was deposed to that:

> *"The Defendants were reluctant to sign any document without legal advise and were assured by Michael Roberts, and Graeme Price that the Draft Agreement would not and could not be binding until the company's solicitors, Lee Turnbull and company in Townsville had perused, approved, formalised, registered and duly stamped the Agreement. Both Michael Roberts and Graeme Price assured the Defendants that the Draft Agreement would be delivered to the company's solicitors, immediately upon their return to Australia".*

Apart from those allegations, there is no other evidence to support this submission. The evidence as seen in the document on the other hand is conclusive. All the relevant pages were duly initialled as correct and the document duly signed by all parties and witnessed by Michael Harley Roberts, the solicitor who prepared the agreement. There is no other written evidence on the document to say that it was a draft only and therefore not binding. If that was so, a reasonable person would have sought to make that clear on the document.

There is also, a clause in the agreement, clause 17, which specifically states: "*This deed is binding upon the heirs, executors, consign and legal representive of the parties hereto.*" Nothing can be clearer than that. The document when signed was expressly stated to be legally binding and with respect, there is no satisfactory explanation given as to why the Defendants executed the document, when they knew what clause 17 said.

One would have thought that a reasonable person would have requested that that clause be amended so that it reflected what the Defendants are alleging here, or that that clause be revoked, and replaced with an appropriately worded clause to say that the agreement was only a draft and not binding.

Also in paragraphs 21 and 22, of the affidavit of Michael Harley Roberts, filed on the 26th of July 1993, he stated expressly that at no time was it indicated, that the agreement was only a draft and of no legal effect. One would have thought too that if the agreement was only a draft, then a reasonable person would not have signed the document and attest each page as true and correct! Why would such a person initial a page if it was yet to be checked, perused, approved, formalised and registered. The actions of the parties showed conclusively in my view, that the document was intended to be a final document and to create a legal relationship between the parties. This is not a case of confusion or illiteracy, or mistake. It has not been pleaded that the contents of the agreement were not understand, or that the Defendants were illiterate.

Michael Harley Roberts has deposed to in his affidavit, filed on the 26th July 1993, at paragraph 17, that each document was carefully read through by the parties and discussed in some detail before they were executed.

There is no evidence before me to say that the Defendants did not know what they were signing. It is a general rule of law that a person is bound by a writing to which he has put his signature to.

It has never been argued that the Defendants were signing a fundamentally different document from that which they had contemplated. All that had been submitted was that they had been induced fraudulently to sign a document which was only in draft

form. They had never argued that that draft agreement did not expressly state what they had had in mind at the time of execution. Whether it was in draft form or not, did it express clearly what the parties had in mind or contemplated? With respects, there has been virtually nothing, in the affidavit evidence of the Defendants to show or say, that the agreement as signed on the 24th January 1991, did not express what they originally agreed to and concluded that day. There was an allegation to say that the schedule attached was unsigned and un-initialled and had been altered. Apart from this, there is nothing in the affidavits deposed to, to say what was the original schedule and what were the original figures or details. The Agreement on the other hand, did make specific reference to the items in the schedule. The evidence rather, points fairly conclusively, to an agreement that was understood by the parties, and expressed clearly and correctly, what the parties had contemplated. Accordingly, by signing the agreement, the Defendants clearly intended legal responsibility to arise. But even if the document was to be a mere draft agreement, there is no evidence whatsoever, to show or say that had the Solicitors of the Defendants seen the document that they would have advised any differently.

The Defendants are persons with full legal capacity to enter into such an agreement voluntarily. Where they have done so without establishing fraud or mistake, then not even their solicitors can help them. If the Defendants were not sure about their position, they should have refused to sign the document. I am basically not satisfied that the allegation that they have been induced into signing the agreement, on the condition that it is not legally binding, has any merit. It is one thing to allege fraud, but it is another to show that there is sufficient evidence of fraud, such that I can be satisfied that it is triable, as an issue.

This brings me to consider the next submission, that Wolfgang Meiner's signature on the minutes of the 22nd January 1991, had been forged. With respect, this can be briefly disposed of. The simple truth of the matter is that all the other defendants were present anyway at that meeting, and the fact if true, that Wolfgang Meiners was not present at the meeting would not have materially affected what was agreed to and resolved. If it is true as alleged by him, that he did not know what was discussed and therefore could not have agreed to anything resolved, then he should not have signed the agreement on the 24th of January 1991. He has alleged forgery of his signature, but there is no denial that he was present at the meeting, and knew and understood what was being discussed. There is no denial either, or evidence to say, that he was not aware of what was discussed that day, and therefore was completely ignorant of what was going on. This allegation too is not sufficient as a triable issue to enable me to set aside judgement.

The third ground referred to in the submissions of Mr Rafter, was that one of the

directors of Reef Pacific (Sydney) Pty Limited, Rosa Price, was not present in Solomon Islands when the common seal of Reef Pacific (Sydney) Pty Ltd was affixed on the document. She only attested her signature at a later stage, and most likely when the document had been brought to Australia by Graeme Price, after leaving the Solomons on or about the 25th of January 1991. The problem with this submission is that, all the other signatories to the Agreement **knew**, or must have known that Rosa Price, one of the directors of Reef Pacific (Sydney) Pty. Ltd, was not in Solomon Islands on the 24th of January 1991. This fact has never been denied or disputed by the plaintiffs. By signing the document despite this knowledge, the Defendants took a calculated risk, that Rosa Price may never attest her signature to the common seal of Reef Pacific (Sydney) Pty Ltd. What is important is that she did sign it, at a later stage. That completed the liability of Reef Pacific (Sydney) Pty Ltd to the agreement, and its obligation in accordance with the agreement.

It can be argued that on the 24th January 1991, Reef Pacific (Sydney) Pty Ltd had not yet executed the document. However, that did not in my view affect the manifest intention of the parties to be legally bound by the Agreement. All the other persons present, expressed their intention to be bound by the agreement, by executing the document, on the 24th of January 1991. Reef Pacific (Sydney) Pty Ltd's execution was only partially completed that day, but on one hand it is understandable, as the other director was in Australia. However, on the day she signed the document, the company's liability was completed and it became bound subsequently by the Agreement. As for the defendants, they became bound on the day they signed the document.

I am not satisfied that the failure to attest the common seal of Reef Pacific (Sydney) Pty Ltd on the 24th January 1991 by Rosa Price was done fraudulently, or deliberately, with intent to deceive. It was simply a practical difficulty, as has been subsequently proven, and it was a matter the Defendants knew about anyway, because the common seal was duly attested to at a later stage.

The Defendants knew, or must have known, that Rosa Price was not at Gizo on the 24th of January 1991. They knew, or must have known, that the directors of Reef Pacific (Sydney) Pty Limited were Rosa Price and Graeme Price. They knew or must have known, that a common seal is attested to by at least two signatories. They knew or must have known, that the common seal of Reef Pacific (Sydney) Pty Limited was attested to on the 24th January by only one of the directors, Graeme Price. And accordingly, in terms of the binding nature of the agreement on the Company, Reef Pacific (Sydney) Pty, Ltd, they knew, or must have known, that that was incomplete, and that there was a risk involved as to that company's liability, if they should have the document executed that day. Yet they did execute the document, and took the risk. It is not disputed that Rosa Price did have her signature appended to the common seal at a later

stage.

For all purposes therefore, despite the irregularity and the risk involved, I am satisfied that the Defendant's intended to be bound by the Agreement as at the 24th of January 1991, and cannot with respect now come to this court and argue, that they were not bound by the Agreement because on the 24th of January 1991, one of the directors had not signed for and on behalf of the company, Reef Pacific (Sydney) Pty Ltd. I am not satisfied that the element of fraud has been sufficiently made out in this submission.

The fourth ground raised is that the agreement is not admissible as it had not been stamped as required by the Stamp Duties Act. The relevant section reads:

> *"No document executed in Solomon Islands or relating wheresoever executed, to any property situate in the Solomon Islands or to any matter or thing done or to be done in Solomon Islands shall, except in criminal proceedings and in civil proceedings by a collector to recover any duty or penalty under this Act, be pleaded or given in evidence or admitted to be good, useful or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed."*

With respect to the submissions of Mr Rafter, this is a technical issue. If there is non-compliance it does not render the document null and void. This is why under section 11 of the Stamp Duties Act it provides:

> " *If any document, required by this Ordinance to be stamped, is not duly stamped within two months of the execution thereof, it shall only be stamped upon payment to a Collector of the following penalty, that is to say a penalty of two dollars if stamped within six months of the execution thereof, or if not stamped within six months of the execution thereof, a penalty of twenty-five per centum of the duty payable, for each period of three months that the duty remains unpaid after the expiration of the said period of six months, or of ten dollars, whichever is the greater."*

There is therefore no time limit as to when such a document can be stamped. All that is provided is a penalty clause for late stamping of documents after two months. So, if a document is stamped 2 years later, that does not make it any less admissible, good, useful or available in law, as if it had been stamped within two months of the execution thereof. This is a technical defect, which can be corrected with immediate effect, and with respect, is not a triable issue, and a ground for setting aside this judgment.

The fifth ground relates to the requirement of security for costs. With respect, this

point has been adequately covered and dealt with in an earlier judgment of the court dated 3 August 1993 in the same case. I do not need to repeat what has been stated in that judgment. The only additional information provided was that this matter was raised before the court on the 16/3/92 and also on the 9/4/92, during the hearing of a motion for judgement filed by the Plaintiffs, on the 5th of December 1991. No separate application however, was lodged to challenge, the validity of the security, in the form of a Bank Guarantee, lodged with the Registrar of the High Court, and thereby to have the proceedings stayed.

As stated in the judgement of this court of the 3rd August 1993 in this case, at page 2, this point has been raised late. The Bank Guarantee had been accepted as valid by the learned Registrar, and on that basis, proceedings have been duly conducted and judgement respectfully given. The subsequent proceedings have not been influenced or affected in any way by the purported Bank Guarantee.

As a ground for setting aside judgement, with respect, it is in my view insufficient. As also stated in the same judgement of this court at page 2, last two paragraphs, even if a stay had been granted, there is nothing to stop the Plaintiff from applying to have the stay removed. Further, it has not been shown that the purported Bank Guarantee could not have been made good had it been called upon. The purpose why security for costs is ordered is to ensure that there are sufficient funds within the jurisdiction of this court in the event the Plaintiff loses his case, to meet the costs of the Defendant. It does not relate to the merits of the case and accordingly, is not a triable issue at this point of time, such that it would justify setting aside the judgements already obtained. In the exercise of my discretion, this ground too must be dismissed.

The application is therefore dismissed. I have considered the question of costs. I appreciate the difficulties the Defendants have had with Solicitors in the pursuit of this case. I will therefore make no order for costs in this application.

(A.R. Palmer)
JUDGE