IN THE COURT OF APPEAL OF TONGA

NUKU'ALOFA REGISTRY **AC 24 of 2009**

BETWEEN : SIOSAIA MOEHAU, SIONE TAFOLO, KOSEMA FALEMAKA, PENI LAVAKEI'AHO, 'ATUNAISA FETOKAI, LEIMONI LAVAKEI'AHO, SIONE TUITA, FE'OFA'AKI NONU, MALAKAI 'AKE, HOTINI FIFITA and LEKAU VEIKUNE

- Appellants

AND : PACIFIC STORES LIMITED

- Respondent

Coram : Ford CJ
Burchett J
Moore J

Counsel : *Mr Stanton* for the Appellants
***Mr Stephenson* for the Respondent**

Date of hearing : 8 July 2009.

Date of judgment : 10 July 2009.

JUDGMENT OF THE COURT

[1] This is an appeal against a refusal by Shuster J to set aside a default judgment for which the Respondent (the plaintiff) had applied, its counsel conceded, within one day of the expiry of the time for the filing of a Statement of Defence, the judgment being entered within one week after that expiry. The application for judgment in default was made without any further warning after the service of the statement of claim that the time for filing a statement of defence would be insisted upon to the day, although the Plaintiff's solicitor had been informed by Mr Moehau, as had his client previously, that the Appellants denied liability on the ground that a particular fellow defendant in the proceeding had had no authority, actual or ostensible, to bind them.

[2] It is unnecessary now to go into the details of the Appellants' proposed grounds of defence because a concession was made at the hearing of the appeal that the Appellants had raised an arguable defence. But it should be noted that a defence - as this is - denying the authority on any basis of a fellow committee member of an unincorporated club to bind the other members to a contract is one that is likely to raise questions involving, as any lawyer would appreciate, complexities both of fact and of law. Had an extension of time been sought to investigate the facts and research the law for the accurate formulation of a statement of defence, there is no reason to doubt some further period would have been allowed.

[3] Although the default judgment was sought ex parte so speedily, it was not until a month and a half later, after the Respondent (the plaintiff) had itself sought and obtained the indulgence of an extension of time to do so, that it was served upon Mr Moehau, the First Appellant. The dates are : service of Statement of Claim on each Appellant 20 January 2009 ; application for default judgment made ex parte 18 February ; entry of judgment upon the application 24 February ; service upon Mr Moehau 3 April ; filing by all Appellants of application to set aside default judgment 6 May 2009.

[4] In his affidavit in support of the application of the Appellants, Mr Moehau explained his dilatoriness with respect to the matter by stating

– and this was not challenged – that at the time of the service of the statement of claim he "had pressing financial matters concerning [his] businesses generally and [his] attempts to get them refinanced and/or restructured with the Westpac Bank of Tonga" and he "also had overseas commitments". Because of "the pressure of attending to [his] business affairs and to settling litigation … with a former joint venturer", he was "distracted … from the task of defending the Statement of Claim, along with [his] fellow Committee Members", among whom it is clear he was the one taking the leading role. At the same time, he urged the fact that he had already, on behalf of himself and the other Appellants, made it clear orally, to both the manager of the Respondent and its solicitor, that the claim was denied by them. The affidavit of Mr Moehau was not challenged by cross-examination or by the filing of any affidavit on behalf of the Respondent.

[5] The leading case in Tonga on the relevant law is the decision of Ward CJ in *Jewett Cameron South Pacific Ltd v Tu'uholoaki* (1999) Tonga LR 51, where (at 53) his Honour said, after referring to the then Order 13 rule 3 (which was in terms corresponding to the present Order 14 rule 4 (1), apart from the insertion in the present rule of express reference to the question whether an order would cause the plaintiff to "suffer irreparable injury"):

> "The defence must establish with potentially credible evidence on affidavit that there is a real likelihood that the defendant will succeed on the facts. The merits of the case is the most important consideration in all such cases and where there is a real possibility of success the defendant should not be denied his day in court. The classic statement of the principle is by Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 480 referring to the, then, equivalent rules in England which gave a discretionary power to a judge in chambers to set aside a default judgment."

Ward CJ then set out the passage from Lord Atkin's judgment, which fully supports his statement of the primacy of the merits upon such an application.

[6] In *Re Coles and Ravenshear* [1907] 1 KB 1 at 4, in a passage cited with approval by the full Federal Court of Australia in *Jess v Scott* (1986) 12 FCR 187 at 189, Collins MR said :

> "Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

[7] In any case, there is authority that, apart from the express Rules of Court, "there is an inherent power in the court to prevent an abuse of its proceedings and a judgment, although the application is out of time, will be set aside if circumstances require it" : The Supreme Court Practice (the "White Book") 1991 p.137.

[8] In Australia, in the analogous case where a party seeks an extension of time to bring an appeal, as was pointed out in *Jess v Scott* at 194 :

> "... the joint judgment of Reynolds, Hutley and Bowen JJA in *Outboard Marine Australia Pty Ltd v Byrnes* [1974] 1 NSWLR 27 at 30 includes the following:
>
> 'We appreciate that the Rules of Court, particularly those relating to time, should never be allowed to be an instrument of tyranny. They do, however, have purposes, one of which is that the parties may know where they stand and regulate their affairs accordingly. It is also appreciated that where genuine issues ought to be litigated, if such can be done with fairness to all concerned, it is appropriate to take a benign view of applications to extend time.' "

[9] Shuster J rejected the application to set aside the judgment upon a basis that took no account of what was a defence on the merits. Although counsel for the Respondent had submitted that defence was not "an arguable defence", we consider it clearly was arguable, and counsel at the hearing of the appeal conceded it was.

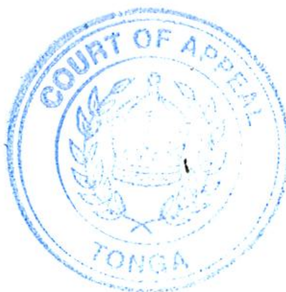
[10] The extremely short time - one day - which elapsed before the application to enter default judgment is a factor which his Honour appeared to overlook, and although the Appellants were dilatory an explanation was made in Mr Moehau's affidavit, the circumstances disclosed not being the subject of contradiction. His Honour treated the issue as if the period of delay to be accounted for were the period that elapsed before the making of the application to set aside the

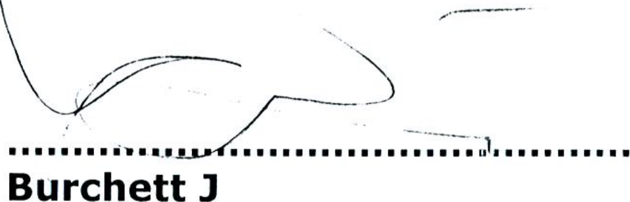
default judgment. To do that involved an error of law. Once the judgment was entered, the Appellants could not have filed a Statement of Defence.

[11] His Honour also stated in one short sentence that he believed "the Plaintiff may suffer irreparable injury if [he] were to set [the judgment] aside". However, the only argument put forward by counsel for the Respondent to support this proposition was that one of the Appellants might dispose of assets. There was, however, no suggestion in the case of any action or circumstance tending to indicate there was any realistic apprehension of that kind. Had there been, of course, an appropriate undertaking to the Court could have been required.

[12] Having regard to all of the matters set out in these reasons, we conclude that his Honour's discretion miscarried ; the orders made below should be set aside ; and in lieu of those orders, the default judgment entered against the Appellants should be set aside. As the normal order below in such circumstances would require the Appellants to pay the costs of and incidental to their application for an indulgence, while the Appellants, as successful parties to the appeal, would normally receive their costs of the appeal, we think justice would be done by an order that there be no order as to the costs of and incidental to the application below or the costs on appeal, and we so order.

Ford CJ





Burchett J

Moore J