

SENG MI COMMERCIAL COMPANY

v.

**JOHN Y. SINGH AND COMPANY LIMITED
& JOHN YOGENDRA SINGH**

[HIGH COURT, 1998 (Fatiaki J) 9 October]

Evidence- relevance of criminal conviction to application for summary judgment. Evidence Act (Cap 41) Section 9; High Court Rules (1988) Order 14 rule 1.

The High Court was asked to give summary Judgment in civil proceedings on the basis of a certificate of conviction issued by a Magistrates' Court. The High Court explained that the mere fact of conviction does not obviate the need to plead the conviction relied on and the issues in the proceedings to which the conviction is relevant. On the facts disclosed, the High Court granted leave to defend upon payment in to Court of the sum claimed.

Case cited:

Van Lynn Developments Ltd. v. Pelias Construction Co. (1968)
3 W.L.R. 1141

Interlocutory application in the High Court.

W. Clarke for the Plaintiff
H. Lateef for the Defendants

Fatiaki J:

There are two alternative parts to the plaintiff's present application which is brought under Order 14 r.(1) and Order 18 r.18(a), (b) & (c) of the High Court Rules.

In its Order 14 application the plaintiff seeks summary judgment for the sum of US\$97,825.70 on the basis that the defendants have no defence to its Claim. The application is supported by a five paragraph affidavit deposed by an authorised person.

At the outset I should point out that the affidavit is deficient in two very material respects in so far as it wholly ignores the requirements of Order 14(2) that the affidavit should :

- (1) verify the facts on which the claim or part of the claim is based ; and
- (2) state that in the deponent's belief there is no defence to the claim.

No issue was raised by defence counsel in that regard however so I turn to consider the merits of the application.

- A In substance, counsel for the plaintiff submits that since the 2nd defendant was convicted before the Magistrates' Court, Suva on criminal charges based on the facts giving rise to this case, this obviated any need for the plaintiff to prove its claim on a lesser standard of proof since the issue of liability is now *res judicata*. Accordingly, so the argument goes, there is no defence to the plaintiff's claim and counsel refers to Section 9 of the Evidence Act (Cap. 41) in support.

With all due regard to the submission, I cannot agree. Section 9 of the Evidence Act (Cap. 41) is a facilitative provision which obviates the need independently to prove a conviction which "... is relevant to any issue in (the) proceedings". It does not obviate the need in the civil claims, to plead the conviction relied upon, or more particularly "the issue in the proceedings to which the conviction is relevant" [See: Order 18 r. 21(1)].

Much less in my view can a bare record of a criminal conviction without more give rise to *res judicata* of a civil claim, albeit, one based upon the same facts.

- D Secondly, the evidence provided by the plaintiff in support of the 2nd defendant's so-called conviction is wholly inadequate being comprised of a solitary Certificate of Court Proceedings issued under the Seal of the Magistrates' Court, Suva which reveals that the 2nd defendant was charged with two criminal offences and was sentenced on 10.7.98 to 12 months imprisonment, for which offence is unclear. No certified record of the Magistrates' Court proceedings and no copy of the trial magistrate's judgment have been produced, and therefore, what the trial magistrate's findings of fact were in the trial of the 2nd defendant remains undisclosed.

- F I accept that both offences with which the 2nd defendant was charged in the criminal proceedings, do require an intent to defraud to be proved, but the other ingredients of the offences charged, in the absence of a copy of the charge in the case, are likely to have been quite different albeit that the evidence led at the trial might have been the same.

- G Thirdly, the status of the 2nd defendant's conviction is at least uncertain, when one considers that there is a pending appeal against conviction and sentence, and, furthermore, if the petition is accurate as to the conviction, and there is no reason to doubt it, then the 2nd defendant was convicted in the Magistrates' Court of stealing by trick a container full of trochus shells and not obtaining US\$97,825.70 by false pretences as plaintiff's counsel suggests.

There are in my opinion far too many undisclosed imponderables in the criminal proceedings to justify this court relying on the 2nd defendant's criminal conviction in this application.

Counsel for the defendants in opposing both applications referred to the 2nd defendant's Petition of Appeal and submits that since the plaintiff's claim is undoubtedly based on an allegation of fraud [See : Statement of Claim para. 12(a) to (h)], it is plainly excluded from the ambit of an application for summary judgment [See : Order 14 r.2(b)] and counsel refers to an earlier Order 14 application by the plaintiff which was withdrawn by plaintiff's previous counsel for that very reason.

A

More importantly, defence counsel submits that the defendant's Statement of Defence raises triable issues as to the whereabouts of the plaintiff's loaded container which it claims was delivered to the Ports Authority of Fiji for shipment to the plaintiff company in Korea.

B

The defendants do not deny however that they were paid and have received US\$97,825.70, neither is it denied that the plaintiff company have not received the trochus shells that it had contracted to purchase from the defendants (See : paras. 3 and 8 of Statement of Defence).

C

The defendants other than denying responsibility for the plaintiff's loss, have not directly pleaded to paragraph 21 of the Statement of Claim in which the plaintiff claims that :

"(it) has suffered loss in that it has paid the defendants US\$97,825.70 for goods to be supplied to it and the defendants have failed to supply the goods to the plaintiffs."

D

In substance, the defendant's defence is that on 9th November 1996 they delivered the plaintiff's container of trochus shells to Ports Authority of Fiji for shipment to Korea and what happened thereafter to it, is unknown to them and not their responsibility. No attempt however, has been made to join the shipper as a third party as one might have expected in the circumstances.

E

I am however reluctantly driven to the conclusion that there are triable issues raised in the Statement of Defence not only as to the nature and terms of the contract between the parties viz was it "CIF" or "FOB"? but also, as to the circumstances surrounding the delivery of an empty container to the plaintiff company in Korea.

F

Having said that however, and bearing in mind that there has been no attempt whatsoever to deny that the 2nd defendant has absconded to the United States of America using a false passport and is currently being sought by U.S. Immigration Authorities so that he may be repatriated to Fiji, and mindful that the defendants do not deny the plaintiff's claim in para.3 of the Statement of Claim that the 2nd defendant was the person who was engaged in all material dealings with the plaintiff, and given this Court's earlier considered ruling of 6th March 1997 which post-dates the Statement of Defence and where the court rejected the defendants application to dissolve a *mareva* injunction and discharge a writ *ne exeat regno* ordered against the 2nd defendant, I am satisfied in the words of Lord Denning M.R. in Van Lynn Developments Ltd.

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v. Pelias Construction Co. [1968] 3 W.L.R. 1141 at p.1146E that the defendant's defence is evasive and at best "shadowy".

- A Leave to defend is accordingly granted to the defendants on condition that within fourteen days of the date hereof the defendants deposit in Court a bank cheque for the Fiji dollar equivalent of US\$97,000 calculated at the exchange rate as at the date of this judgment, and, failing which, judgment is to be entered in favour of the plaintiff in the sum of US\$97,825.70 together with interest of 13.5% p.a. calculated from 15th January 1997 and costs to be taxed if not agreed.
- B

(Defendant granted conditional leave to defend.)