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B. W. Holdings v Graham Eden & Associates Ltd [2000] FJLawRp 15; [2000] 1 FLR 1 (10 January 2000)

[\[2000\] 1 FLR 1](#)

IN THE HIGH COURT OF FIJI

B.W. HOLDINGS

v

GRAHAM EDEN & ASSOCIATES LIMITED

High Court Civil Appellate Jurisdiction
Scott, J
10 January, 2000
HBA 23/99S

Civil practice and procedure - service on a company - whether judgment obtained in the Magistrates Court can be set aside for failure to serve according to the requirements of the [Companies Act](#) - whether proposed defence raised bona fide triable issues - [Companies Act](#) (Cap 247) ss110(1), (2), (3) & (4), 168, 391(1) and (2) – Magistrates' Court Rules O. VII r.8(3), O. XXX r.5.

A Writ claiming debt owed as bank charges incurred by the respondent on behalf of the appellant was served by registered post but returned unclaimed. The Magistrates' Court entered judgment in default of appearance for the respondent. The appellant applied in the Magistrates' Court to set aside the judgment on the ground that there was no proper service on the appellant. The Magistrates' Court rejected the application. The appellant appealed. It provided a Form 201 showing an incomplete residential address. A previous company search of Notice of Situation (Form 201) and Annual Returns revealed a postal box, which was denied by the appellant.

Held - (1) a person is entitled to rely on the Annual Returns establishing a company's registered address.

(2) Section 110(2) of the [Companies Act](#) is directed at removing from a company an excuse for failing to comply with s110(1) the fact that it had included its address in its annual return. It is designed to tighten the registration of companies, not to provide a shield to a company which has not complied.

(3) Provisions of the [Companies Act](#) should be read permissively. The purpose of the provisions is to provide a way in which service should ordinarily be effected on companies to reach the company's management. If compliance with the provisions of the Act are impossible or extremely difficult, the court will not hesitate to allow another form of service.

(4) The appellant was not advancing a *bona fide* defence giving rise to triable issues, where it had borrowed money to pay for purchases and then refusing to pay the costs of the borrowing.

Appeal against Ruling of Magistrates' Court dismissing an application to set aside judgment fails and is dismissed.

[Note: on appeal, the Court of Appeal held (1) that the appellant is estopped from disputing the postal address as it appeared on the appellant's correspondence and was confirmed by the postmaster and the appellant's receptionist; (2) there was no error in the appropriate principles used by the resident magistrate when considering whether bona fide defence. Appeal is dismissed with costs to the respondent: ABU0027.2000S 16 August, 2002]

Cases referred to in judgment

ref *Day v RAC Motoring Services Limited* [1999] 1 All ER 1007
cons *Gaskell v Chambers (No. 1)* (1858) Ch. 26 Beav. 252

Subhas Parshotam for the appellant
Ma'ata Sakiti for the respondent

10 January, 2000.

JUDGMENT

Scott, J

On 6 October 1998 the Respondent (Eden) commenced proceedings against the Appellant (the Company) in the Suva Magistrates Court. Eden claimed the sum of \$10,810.97 plus interest and costs which sum it said represented bank charges, details of which were annexed to the writ, which had been incurred by Eden after it had established a letter of credit on behalf of the Company following the purchase by the Company of tiles and fabric from Eden. According to an affidavit of service of Seru Batidradra dated 22 October 1998 the writ was served both on the Company and its Secretary by being posted by registered post on 13 October 1998 to P.O. Box 2449 Government Buildings Suva. According to a second affidavit of service of David Whippy dated 12 April 1999 the letter of 13 October 1998 which had contained the writ was returned by the postmaster on 8 January 1999 stamped "Final Notice", "Second Notice" and "Unclaimed".

As also appears from Mr. Whippy's affidavit a search on behalf of Eden took place at the office of the Registrar of Companies in July 1998. This search revealed a Notice of Situation Form 201 (see [Companies Act](#) - Cap 247 - the Act - S-168) filed on 14 May 1997 and the Company's Annual Return for 1996 filed on the same date, both of which gave P.O. Box 2449 as the Company's address. In January 1999 the Office of the Registrar of Companies was again searched with the same result and additionally, in the same month, both the Company's receptionist Ms. Pande and the Post Master confirmed that P.O. Box 2449 was held by the Company.

Paragraphs 13 to 17 of the affidavit of the Company's Managing Director Uday Narayan sworn on 22 February 1999 are entitled "Background as to service of Writ of Summons". Mr. Narayan does not dispute the evidence either of Seru Batidradra or of David Whippy. In paragraph 11 he avers that while P.O. Box 2449 is "my Company's postal address it is not my Company's registered postal address" but what his Company's registered postal address in fact is, he does not reveal. He states that his Company "was not served with any writ of summons" but offers no explanation as to how the writ, which he does not deny was sent to P.O. Box 2449 was not uplifted on behalf of the Company. He annexes a Form 201 dated 5 May 1997 which discloses no registered postal address of the Company at all and only contains a residential address at Vishnu Deo Road, Nakasi which does not have a street number. Despite not denying the contents of the annual return filed on 14 May 1997 (a copy of which is Exhibit C to an affidavit filed by Graham Ross Eden sworn on 17 April 1999 - the relevant part of which reads:

"Situation and Postal Address of the registered office of the Company are as follows: Vishnu Den Road Nakasi P.O. Box 2449, Government Buildings, Suva")

he states, with breathtaking disingenuousness that:

"At no time was P.O. Box 2449 registered with the Registrar of Companies as my Company's registered postal address."

On 5 November 1998 the Suva Magistrates Court awarded Eden Judgment in Default of appearance and defence (Exhibit C to David Whippy's affidavit) in the amount of \$11,011.92 plus interest accruing.

On 2 February 1999 the Company applied, under the provisions of Order XXX Rule 5 of the Magistrates' Courts Rules for the Judgment to be set aside and for the Company to be given leave to defend. The first ground for this application was that:

"Judgment was obtained without proper service of the writ of summons being effected on the Defendant".

The application was heard by Ms. Gwen Phillips RM on 26 April 1999. In addition to hearing counsel Ms. Phillips also had the affidavits above referred to before her. On 23 June 1999 she delivered a ruling rejecting the application. This is an appeal against that ruling.

Both Counsel have filed comprehensive and helpful written submissions. Although there are 6 grounds of appeal the two basic arguments advanced by Mr. Parshotam are:

(i) that the Judgment was not entered regularly and that therefore the Company is entitled as of right to have it set aside; and in the alternative

(ii) the Resident Magistrate should have exercised her discretion to set aside the Judgment in fact entered on the ground that the Company has "an arguable case which carries some degree of conviction" (see *Day v. RAC Motoring Services Ltd* [1999] 1 All ER 1007.

The crux of Mr. Parshotam's argument on the first point is Section 110 of the [Companies Act](#) which reads as follows:

"Notification of Situation of Registered Office and Change of Therein

110. - (1) Notice of the Situation of the Registered Office and the Registered Postal Address, and of any change therein, shall be given within 14 days after the date of incorporation of the Company or of the Change, as the case may be, to the Registrar for registration.

(2) The inclusion in the annual return of a company of a statement as to the situation of its registered office or as to its registered postal address shall not be taken to satisfy the obligations imposed by this section.

(3) If default is made in complying with this section the company and every officer of the company who is in default shall be liable to a default fine."

Mr. Parshotam points to Section 100(2) and says that since Eden relies on the Company's Annual Return filed on 14 May for the P.O. Box 2449 address that is not a valid reliance and accordingly service on the Company was bad. I do not agree.

In my view Section 110(2) is directed at removing from a company the possibility of offering as an excuse for failing to comply with Section 110(1) the fact that it had included its address in its annual return. It is designed to tighten the registration of companies not to provide a shield to a company which has not complied with the requirements of the section.

The service provisions in the [Companies Act](#) are contained in Section 391 which reads:

"391. - (1) A document may be served on a company by sending it by post to the registered postal address of the Company in Fiji or by leaving it at the registered office of the Company.

(2) A document may be served on the registrar by leaving it at, or sending it by post to, his office."

The relevant provision in the Magistrates Courts Rules is Order VII Rule 8(3) which reads:

"(3) Service on a company shall be effected in accordance with the provision of the [Companies Act](#)."

In Fiji's circumstances where there is a notoriously high failure to comply with a detailed requirements of the [Companies Act](#) and where prosecutions for such failures are virtually unknown, I am firmly of the opinion that these provisions of the [Companies Act](#) should be read permissively. The purpose of these provisions is to provide the way in which service should ordinarily be effected on companies. Where, as here, the Company has not fully complied with Section 110(1) the fundamental question is whether the service, as in fact effected, will have reached the Company's Management. Where this not the correct approach than there could never be substituted service upon a company. But where compliance with the service provisions of the Act is impossible or extremely difficult the Court has not hesitated to allow another form of service to take place. Thus, for example, where a company no longer had an office at all, service was properly effected when the former Chairman and Secretary of a company were served (see *Gaskell v. Chambers (No. 1)* (1858) Ch. 26 Beav. 252). In the present case it is not disputed that the Company's postal address was in fact P.O. Box 2449 and neither is it disputed that the address (Vishnu Deo Road Nakasi) is defective. In these circumstances I am satisfied that the Resident Magistrate was correct in concluding that the Company had been properly served with the writ and that therefore Eden was entitled to Judgment in Default of Appearance or Defence.

The next question is whether the Resident Magistrate correctly declined to set the Judgment aside. As already seen, Mr. Parshotam admitted that the Company had "an arguable case carrying some degree of conviction" and that therefore the Company was entitled to have its case heard.

As may be seen from the draft Statement of Defence (page 141 of the record) the Company denies defaulting upon any of its payments by instalment to Eden, says that if in fact Eden incurred any additional costs as a result of the payments by instalments then those costs were to be borne by Eden and suggests that any instalment agreement between the parties was void and unenforceable. The Company does however admit a handwritten letter dated 13 August 1997 which is endorsed on a letter from Eden to the Company dated 12 August 1997 (page 68 of the record) and which forms the crux of Eden's case.

Examination of this exhibit shows that Uday Narayan, the Company's Managing Director, accepted that Eden had incurred additional bank charges and that these would be passed on to the Company and paid for by the Company. The only proposal rejected by Narayan was that the Company be penalised for each default. Such a penalty was described by Narayan as "in law unenforceable, harsh and unconscionable, hence void". Narayan was doubtless correct in describing the general effect of penalties in these legal terms but I cannot accept that they have any bearing on this case. As stressed by Ms. Sakiti and accepted by Mr. Parshotam the proposal to penalise the Company for default was dropped and such penalties form no part at all of Eden's claim which is entirely confined to bank charges incurred by the line of credit arranged by Eden on behalf of the Company.

The granting of leave to come in and defend an action is discretionary. At the end of a 9 page careful examination of the arguments advanced by Counsel for the parties the Resident Magistrate came to the conclusion that the Company was not advancing a bona fide defence giving rise to triable issues. I agree: as I see it this is a simple case of a Company borrowing money to pay for purchases and then refusing to pay the costs of the borrowing. The appeal fails and is dismissed.

Appeal dismissed.

Marie Chan