

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2018-404-2468
[2019] NZHC 2443**

BETWEEN SAK HOSPITALITY LIMITED
Plaintiff

AND KETUL JOSHI
Defendant

Hearing: 16 September 2019

Counsel: P Webb for Plaintiff
B Norling and A Cherkashina for
Defendant

Judgment: 26 September 2019

JUDGMENT OF WHATA J

*This judgment was delivered by me on 26 September 2019 at 4.00
pm, pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Denham Bramwell Lawyers, Manukau
Norling Law Limited, Auckland

SAK HOSPITALITY LIMITED v KETUL JOSHI [2019] NZHC 2443 [26 September 2019]

[1] Sak Hospitality Limited (Sak) obtained judgment by default in the District

Court for \$199,303 against Mr Joshi. Sak then obtained charging orders against

Mr Joshi's assets and transferred the proceeding to this Court in order to enforce the

judgment by way of a sales order. Sales orders were made, and steps were taken to

sell Mr Joshi's home ("the property"). Sometime later, Mr Joshi filed an application

to set aside the District Court judgment and an application seeking stay of enforcement

pending determination of the first application.

[2] This judgment addresses the application for stay.

Background

[3] Sak was incorporated on 14 March 2014. Mr Mehta and Mr Joshi were initial

shareholders and remain so. Sak was in the business of offering retail food services

and, on or around 29 April 2014, it signed a franchise agreement with Habitual Fix, a

network of food stores, to operate one of their stores as a franchisee. The company

was initially financed via cash injections made by Mr Mehta and a loan obtained from

Westpac. Mr Joshi managed the store while Mr Mehta was responsible for marketing

until he left to find different employment.

[4] In the latter part of 2015, Mr Joshi identified an opportunity for a similar venture to that conducted by Sak in Beaumont Street, central Auckland. He says, with

the knowledge and consent of the present directors of Sak (including Mr Mehta), he

formed a company and took over the operation of Beaumont Street business. He

formed a company, Joshi International Limited, for the purpose of operating this business. Mr Mehta denies any knowledge of this until much later.

[5] Mr Joshi says that when the Beaumont Street commenced trading in 2015, a merchant identity had not been provided to him by his bank. This meant it could not

receive payment by Eftpos. He says it was agreed between him and the other directors

of Sak that Eftpos transactions at Beaumont Street would be directed into Sak's

account. He says it was also agreed that he would transfer those funds from Sak's

account to Beaumont Street from time to time.

[6] Mr Joshi then refers to a dispute arising between him and the other shareholders in June or July 2017. He noted that they had become unhappy that the business was not doing sufficiently well to give them a return on their investment to them. He says a decision was made to attempt to sell the Highbrook business and a buyer was found but the offer was not acceptable to them. There was no other interest in the purchase of the business.

[7] Mr Joshi says that about this time accounts for the Highbrook business were prepared by its accountant. He says in those accounts the funds transferred by him from Sak's account to reclaim Eftpos transactions directed to that account from Beaumont Street were incorrectly characterised as personal drawings. Under his instruction a second set of accounts were then prepared. These accounts showed his drawings at \$28,696.

[8] Mr Mehta has a very different account of what occurred. He denies consenting to the intermingling of the Highbrook and Beaumont street businesses. He says, the

financial statements for Sak came as a shock to him insofar as it suggested that Sak

was indebted to Joshi International Limited for the amount of \$320,100. He says he

called an urgent meeting and it was then explained to him by Mr Joshi that his company had been using Sak's merchant account, and that all funds from Eftpos sales

on a daily basis were going to Sak and then Sak transferred those funds to Joshi

International Limited. He says he also noted that \$100,000 that had been advanced to

Sak by Westpac in 2014 had been transferred the day it was received to a previous

shareholder and to Mr Joshi. He said there were also unexplained debts. By the end

of August 2017, he had retained solicitors and sought an explanation as to the liabilities

of Sak alleged by Mr Joshi.

[9] Ultimately, matters reached a point whereby the shareholders resolved at a special meeting on 13 February 2018 to remove Mr Joshi as a director. The remaining

shareholders then undertook a review of the financial statements which they say record

that Mr Joshi was indebted to Sak for his overdrawn current account in the amount of

\$195,717. And, on 21 February 2018, Sak made demand on Mr Joshi for \$195,717.

A response was received from Fortune Manning, Mr Joshi's then solicitors, on

23 February 2018 disputing liability for the debts demanded from him. Mehta also says that between 20 April 2018 and 1 May 2018, Mr Joshi's solicitors made a further

representation that documentation substantiating the disputes would be provided. He

says that Mr Joshi was provided with a further opportunity to substantiate his disputes.

He says that when no information was forthcoming, despite the representations that it

would be, on 1 May 2018 Sak served proceedings on Mr Joshi's solicitor, Sam Khalisi,

an associate of Fortune Manning, who confirmed he was authorised to accept service

on Mr Joshi's behalf.

[10] He says they did not hear from Mr Joshi or his solicitors again and no statement

of defence was filed. Consequently, on 27 June 2018, Sak obtained judgment by

default against Mr Joshi for the debt claimed. Sak then obtained charging orders in

July 2018 against Mr Joshi's shares in Joshi International Limited, another company,

AKS Hospitality Limited and Sak. That same month, Sak obtained a charging order

over the property. Then, on 15 August 2018, demand was made on Mr Joshi for the

debt and Mr Joshi was put on notice of the charging order on the shares and the implications if he was to dissipate any of the shares. Then on 31 August 2018, Sak

made a further demand on Mr Joshi for the debt and also informed him about the charging order on the land.

[11] On 9 October 2018, Sak received a letter from Mr Webb who advised that they act for Mr Joshi and that Mr Joshi had received a grant of Legal Aid to apply to set aside the judgment for the debt. Sak rejected a request to consent to set aside the judgment because it says there was no supporting document substantiating the claims made by Mr Joshi. The matter was then removed from the District Court on 29 October 2018 for enforcement purposes. On 26 February 2019, Sak obtained a sale order and associated order in respect of Mr Joshi's family home. On 26 March 2019, Mr Joshi filed an application to set aside the judgment for the debt. On 27 March 2019, Mr Joshi also made a without notice application for stay of enforcement.

Mr Joshi's financial position

[12] Mr Joshi provided an affidavit as to his net worth. He says that he has assets amounting to \$868,500, including his family home with an estimated value of \$840,000. He says he has secured liabilities of \$445,920.53 and tax liability of \$58,000. He claims therefore that he has assets available to meet unsecured creditors in the sum of \$364,579.47.

[13] This estimate of net worth is challenged by Sak. I summarise the basis for this

challenge at [21] below.

Preliminary issue

[14] Sak submits that as the application to set aside the judgment was filed in the

District Court, it is highly questionable that the application in the District Court can

be made, given that the matter has been removed from the District Court, pursuant to

s 120 of the District Courts Act 2016. However, Mr Joshi has now filed an application

in this Court to have the judgment debt set aside. This issue is therefore now moot.

Principles applying to the grant of a stay of enforcement

[15] It is common ground that Mr Joshi must show that a substantial miscarriage of

justice would result if the judgment were enforced. Relevant principles include:¹

(a) The onus is on the applicant;

(b) A “substantial miscarriage of justice” must be involved bearing in mind that “substantial miscarriage” means “something more than minor or

insubstantial”;

(c) A substantial miscarriage of justice must be “likely to result” if a judgment was enforced;

(d) The Court must seek to recognise and reconcile the conflicting interests

of both parties in such a manner as will best serve the overall interest

of justice. A balancing exercise is involved;

¹ Refer *Bay City Real Estate Ltd v Re/Max New Zealand Ltd* HC Napier CIV-2010-441-134, 8

June

2011 at [19].

(e) A miscarriage of justice is unlikely to result where a party is required

to pay to another an amount that is owing to it and the paying party is

free to pursue its claim against the other party in the normal way; and

(f) Other facts which may be relevant include: the apparent strength or

weakness of the claim; the ability of the applicant for stay to meet the

judgment that is being enforced; and the potential bankruptcy or

liquidation of the party seeking to pursue an apparently strong claim.

The case for stay

[16] Mr Webb (for Mr Joshi) submits that if Mr Joshi is not granted a stay of enforcement pending the hearing of the application to set aside, he will effectively be

denied the opportunity to seek the setting aside of the original default judgment in the

District Court because:

(a) Sak is not in a strong financial position, so that the funds obtained from

enforcement may be irrecoverable;

(b) Mr Joshi may not be able to pursue his claim because legal aid may not

be prepared to fund the claim.

[17] Mr Webb further submits that Mr Joshi is entitled to have the default judgment

in the District Court set aside because:

(a) His failure to file a defence was not his doing but, rather, the fault of his then lawyers;

(b) He has an arguable defence to the claim against him: he can show that

on a careful review of all relevant information, the August 2017

accounts, which formed the basis of the judgment sum, were incorrect

and that a subsequent revised set of accounts completed in January

2018 show the correct position which the directors of Sak have

continued to refuse to acknowledge;

(c) While the plaintiff will not suffer irreparable damage, Mr Joshi will, by losing his family home;

(d) Mr Joshi has a reasonable case for setting aside the judgment:

(i) As noted he has a reasonably arguable defence to the claim;

(ii) The reason for the non-appearance was the failure of his then

lawyers to respond to service of the proceedings on them and

this was entirely beyond Mr Joshi's control;

(iii) The delay was not unreasonable in all of the circumstances,

given attempts were made to resolve matters by agreement.

[18] As to irreparable prejudice, Mr Webb acknowledged that if enforcement is stayed and Sak prevails in defending the application to set aside, they will have been

delayed in the recovery of the funds to which they were entitled. He says, however,

that delay can be compensated for in the award of costs and interest which would no

doubt follow from such an outcome. By contrast, he says it is likely that Mr Joshi and

his family will lose their home and likely be left in a position where they have real

difficulty in rehoming themselves.

Case for Sak

[19] Mr Norling, assisted by Ms Cherkashina, submits there is no merit to Mr Joshi's claimed defence because:

(a) Mr Joshi's overdrawn current account of \$199,303 was confirmed in the financial statement signed by Mr Joshi;

(b) The revised accounts prepared by Ms Jagwani are based only on information supplied by Mr Joshi –

(i) She does not make any personal representations about the validity of Mr Joshi's claims;

(ii) She was very surprised to see how messy Mr Joshi's affairs appeared to be;

(iii) She noted he was moving money from one company to another

very frequently;

(c) There was an additional set of accounts which were prepared and sent

to the Inland Revenue;

(d) Mr Joshi was under an obligation as a director to keep proper

accounting records, substantiating all transactions and therefore if

Mr Joshi's position is that the financial statements were wrong, he was

in breach of his obligations to Sak;

(e) Mr Joshi failed to supply sufficient evidence to support his claims, in

particular -

(i) The information relied upon by Mr Joshi is an accounting

analysis but has not been prepared by an accountant but, rather,

by Mr Joshi himself;

(ii) While the bank statements provided by Mr Joshi demonstrate

payments to third parties, there is nothing to demonstrate that

those payments were made on behalf of Sak or for Sak's benefit

– those payments could have been made for entities such as

Joshi International Limited; and

(iii) Even if the judgment was set aside and a full hearing was held

on the issues, since Mr Joshi did not retain the primarily financial records, there will be no way for Mr Joshi to show that he used his personal funds to pay the expenses of Sak and even if he did, he will not be able to demonstrate the amount of personal funds used for Sak.

[20] Mr Norling submitted that failure by counsel to advise Mr Joshi of the proceedings would provide a justifiable explanation for failure to file a statement of defence, but there was no evidence corroborating the claim by Mr Joshi that he was not advised of proceedings. Furthermore, even if there were evidence, it does not justify an eight-month delay from the time Mr Joshi was aware of judgment to his application.

[21] Mr Norling also emphasised that on the available evidence, Mr Joshi would not be able to discharge the amount owing under the judgment, let alone any further interest and costs. This is based on the following analysis:

(a) The only realisable property of worth is the home;

(b) While Mr Joshi has said the value of the house is \$840,000, an appraisal

of the value of the property indicates it is in fact valued between

\$740,000 to \$780,000;

(c) That appraisal is now out of date;

(d) Mr Joshi has a secured debt of \$445,000, a further debt of \$58,000 to the CIR, and Mr Joshi has also deposed that he has other debts of \$87,379.06;

(e) After deduction of those debts from the value of the house of \$740,000,

that leaves a difference of \$148,794 which is insufficient to cover the

judgment debt; and

(f) Mr Joshi has not disclosed all of his liabilities.

[22] Further, Mr Norling submits that the balance of convenience favours Sak because it will suffer irreparable loss, citing among other things:

(a) The equity in the property is likely to diminish;

(b) The equity in the property has been over-stated;

(c) The value of the property could diminish through negative fluctuations;

(d) The equity is likely to diminish through his own actions, for example, defaulting on the mortgage;

(e) It is questionable that Sak would be awarded costs, given the effect of

the Legal Services Act 2011;

(f) Mr Joshi's delay has unnecessarily increased Sak's costs (he has known

since July 2018 about the judgment but did not file until 28 March 2019); and

(g) Sak is facing significant threats by Westpac to commence enforcement

steps.

[23] Finally, Mr Norling submits that Mr Joshi has not showed that there is any substantial miscarriage of justice:

(a) Mr Joshi has failed to provide sufficient evidence demonstrating that the alleged defence is arguable;

(b) The balance of convenience demonstrates a higher risk for Sak;

(c) Even if the alleged defence to the current account were in fact proven, Mr Joshi still breached his director's duties.

Assessment

[24] I accept that Mr Joshi's defence of the claim appears weak. On his own evidence he intermingled the accounts of separate companies in apparent breach of his

director's duties. He also signed off on the accounts, as a director, which provide the

basis for Sak's claims. His claim now that he felt under pressure to do so and that they

were wrong appears convenient. The apparent lack of corroborating material to verify

the flow of payments he says did occur further undermines the strength of his claims.

[25] I also accept that Sak has legitimate concerns about Mr Joshi's ability to meet

Sak's judgment debt, and that there is a risk that the value of the property over which

Sak has a charging order is will diminish over time. The delay in bringing the application is also a factor against the grant of a stay.

[26] Balanced against this, I am satisfied that the failure to file a statement of defence was the fault of Mr Joshi's lawyers. As such, Mr Joshi was deprived of his

day in Court through no fault of his own. Therefore there has been a miscarriage of

justice already, and Mr Joshi seeks an opportunity to make a case for being allowed to

have his day in Court via his application to set aside the judgment which is premised

on this miscarriage.

[27] For my part this is a very powerful basis for grant of a stay pending the hearing

of the application to set aside the judgment, particularly where the stay relates

to a

family home, as here. Furthermore, I am not satisfied issues raised by Sak about the

merits of his defence to Sak's claim, his potential inability to meet judgment or delay

sufficiently offset the substantial miscarriage that will follow if stay is not granted.

The reasons for that are:

(a) Presumptively, Mr Joshi ought to have an opportunity to seek to remedy

the miscarriage arising on his lawyer's apparent negligence;

(b) The impact of not granting the stay on Mr Joshi is immediate – he will lose his family home;

(c) While not ideal, Sak's position is at least protected to some degree by the charging order over the house, and an agreement in respect of proceeds of sale of a business part owned by Mr Joshi;²

(d) The delay, while still a factor against stay, is not altogether inexplicable.

There were ongoing exchanges between the parties and Mr Joshi's

ultimate response should not have come as a surprise. In this regard,

² There is a claim by a third party on these proceeds, but that claim would affect Sak's

entitlements

irrespective of the stay.

Mr Joshi was given formal notice of the charging orders on 15 August

2018. He applied for legal aid in late September and received it on 8 October 2018. His counsel advised Sak of the reason for Mr Joshi

not filing his defence on 9 October 2018 and sought consent to have it

set aside. Sak refused to consent but did not make its request for issue

of sale order until 19 February 2019. Mr Joshi then filed his application

on 27 March 2019.

[28] Furthermore, I am not persuaded that if the stay is not granted, Mr Joshi will be able to have his day in Court, either against Sak or against his former lawyers.

There is clear evidence before me that Sak is not in a strong financial position, so may

not be able to repay Mr Joshi should he succeed. Mr Norling responsibly accepted

this. As to the former lawyers, while there appears to be a prima facie case in negligence, it would be speculating on my part to assess the prospects of success in

such a claim. Indeed, if I accept Sak's argument about the substantive merits, that

prospect must be very low. But, in any event, Mr Joshi will have lost the family home

in the meantime. That reality more than offsets the availability of a claim against

either Sak or the lawyers at some time in the future.

[29] Finally, this is an unusual case, involving a clear example of procedural injustice. Counsel were unable to find a comparable one in the authorities. But it seems to me that the stay provisions were designed to assist in circumstances where,

as here, there had been such a clear case of procedural irregularity and unfairness. The

substantive underlying merits have less relevance in cases like this because there has

already been, in my view, a substantial miscarriage. To disallow Mr Joshi the opportunity to show that he should be given the opportunity to seek to have the judgment set aside prior to losing his home is to severely compound the miscarriage

he has already endured. I should add that having reviewed the evidence, while not

strong given the absence of corroborating primary fact evidence, there is a plausible

basis for a defence raised by Mr Joshi, namely that he has a net positive balance with

Sak. It may be that the credibility of his account will not bear the scrutiny of cross

examination or closer review of the available information, but for present purposes his

explanation is not so incoherent that it should be dismissed in this context.

[30] Having said that, nothing I say here should bear on the merits of the application

to set aside. Quite plainly, the usual threshold tests apply, including the

requirement

to show that the defence has some merit. Furthermore, any stay should be conditional

on two things:

(a) Mr Joshi should be put to the task of having independent counsel

confirm that a statement of defence was not filed because Mr Joshi was

not properly advised of the claim against him (as Mr Webb contends);

and

(b) Mr Joshi should provide surety that the equity in the home has not and

will not be dissipated pending the resolution of the application to set

aside the judgment. Submission were helpfully filed by Mr Norling with some suggested measures that might assist in this regard.

[31] I there propose therefore to make the following directions:

(a) Mr Joshi must provide an affidavit of independent counsel confirming

(or otherwise) that a statement of defence was not filed because Mr

Joshi was not properly advised of the claim against him by Sak within

5 working days;

(b) Mr Joshi must confirm by way of affidavit the quantum of secured

liability in respect of the home (or less) within 5 working days;

(c) Mr Joshi must ensure that all payments to secured creditors of the property and the Insurer are up to date;

(d) Mr Joshi must ensure that all obligations to the secured creditors of the property are complied with;

(e) If, at any time, Mr Joshi does not comply with (b), (c) or (d), he must advise Sak immediately;

(f) Sak will have leave to seek a telephone conference before me if it has any concerns about non-compliance with these directions or otherwise (including about the delay it obtaining a fixture on the application to set aside).

[32] In the result, subject to compliance with the above directions, the application

for stay pending the hearing of the application to set aside is granted.

[33] The also needs to be an urgent fixture. I had hoped to arrange one. But presently there is no fixture date available this year. It may be that the parties can

obtain a backup fixture. In this regard, I direct Mr Webb to liaise with the registry to

obtain the first available date for a fixture, including a backup

fixture.

SCHEDULE

BASIS FOR CLAIM SAK OWES MR JOSHI \$123,233.26

Deposits into the Highbrook Store trading account other than those arising from sale at that store were:

For FY end 2015 \$7,140.00 (1)

For FY end 2016 \$134,962.09 (2)

For FY end 2017 \$382,621.31 (3)

For FY end 2018 \$339,326.26 (4)

The transfers made out of the Highbrook Store trading account were:

For FY end 2015 \$87,973.94 (5)

For FY end 2016 \$260,904.09 (6)

For FY end 2017 \$448,816.36 (7)

For FY end 2018 \$351,635.50 (8)

Expenses paid to the benefit of the Highbrook Store from my other entities were:

For FY end 2015 \$64,107.82 (9)

For FY end 2016 \$164,847.23 (10)

For FY end 2017 \$119,289.13 (11)

For FY end 2018 \$60,269.81 (12)