IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 82 OF 1986

Between:

FIJI PINE COMMISSION Appellant

- and -

J. SANTARAM & SONS Respondent

Mr. C. B. Young for the Appellant
Mr. J. G. Singh for the Respondent

Date of Hearing: 16th May, 1988

Delivery of Judgment: 1 July, 1988

JUDGMENT OF THE COURT

At the hearing of this appeal, Mr. Young presented us with an application "under the slip rule" for an order that the default judgment be amended by the inclusion of an award of interest as prayed for in the Statement of Claim. In an affidavit sworn by Mr. R. Raniga, who states he is counsel now representing the appellant/plaintiff, the "slip" is described as "an omission on the part of Kamal Kumar a law clerk, whose affidavit was filed in support of an application for judgment for interest, not to insist upon interest being included in the default judgment against the Respondents".

The application was pursuant to O. 20 r. 10 High Court Rules 1988 which is as follows:-

> "10. Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omissions, may at any time be considered by the court on motion or summons without an appeal."

While we are firmly of the view that the failure to enter up judgment by default for damages and interest to be assessed cannot in the circumstance be considered to be a clerical mistake or accidental slip or omission, Mr. Young has referred us to authorities some of which we propose to consider.

Mr. Young relies mainly on the Privy Council case of Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co. (1973) 1A.E.R. 570. That was a case where the Trial Judge gave judgment in favour of the Respondents but omitted to make an award for interest. The respondents applied by summons for an order that interest should be paid on the judgment. The Judge who heard the summons (not the trial Judge) dismissed it for want of jurisdiction. Application was then made to the trial Judge to amend under the slip rule and he decided that the correction should be made. The Privy Council held the order correcting the judgment was correctly made.

That was a case of an accidental omission by the Judge and was clearly covered by the slip rule.

Reference was also made to the case of Inchcape, Craigmyle v. Inchcape (1942) 2 A.C.R. 157 where a judge allowed correction where counsel had omitted to ask for costs incurred prior to the issue of the summons.

The editorial note to this case states:-

> "There has been some conflict of authority as to how far under the slip rule the Court will vary an order for costs. It is to be noted that the Court of Appeal has said that the rule is to be strictly construed."

The editorial is critical of the decision in that case.

At the expense of lengthening this judgment we propose to set out the background to it. We do so because in so doing we have an opportunity to refer to the apparent inability of some practitioners to distinguish between a liquidated and unliquidated claim and arising from that whether to enter final judgment or interlocutory judgment when a defendant is in default.

The appellant commenced action against the respondent by writ dated 8th September, 1982. The claim was for damages for negligence by the servant of the respondent who was involved in an accident on the 12th day of September, 1978, in which the appellant's Bedford truck was extensively damaged. The statement of claim alleged the truck was worth $16,000 at the time of the accident and was a total loss. The scrap value was said to be $5,000. The appellant claimed $11,000 and interest at $10 per centum per annum calculated from 12th September, 1978 to date of judgment.

The claim for interest was apparently meant to be pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Rent and Interest) Act although this is not stated in the claim as it should have been. No proper basis was laid in the Statement of Claim in support of the claim for interest. The section is as follows:-

> "3. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange".

The respondent as defendant in the action did not file a defence. The appellant thereupon, more than 3 years after a Defence should have been filed, purported to enter up judgment in the following final form:-

> "NO DEFENCE having been entered by the Defendant herein IT IS THIS DAY ADJUDGED that the Defendant do pay the Plaintiff the sum of $11,000.00 and $25 costs."

The appellant complains that it attempted to enter up judgment for the interest claimed but a court official refused to accept the summary judgment in the form presented to him for filing. In so doing the official acted correctly. The judgment was final in form as to the sum of $11,000 and costs but interest had to be first approved by a Judge and quantified if the claim was made under the Law Reform Act.

Order 19 Rules of the High Court provides for entry of summary judgment in a number of instances where the defendant is in default of pleadings. Only Rules 2 and 3 need to be considered.

Under Rule 2,where a defence has not been filed and the claim is for a liquidated demand, final judgment may be entered for the sum claimed and costs. Under Rule 3, where the claim is for unliquidated damages, interlocutory judgment may be entered for damages to be assessed and costs.

The solicitors for the appellant appear not to have appreciated that their client's claim was for unliquidated damages. The appellant's own assessment of its loss by putting a figure of $11,000 on it did not make the claim a liquidated one. It was necessary for the appellant to

prove its loss when damages were assessed by the Registrar or the Court.

Note 6/2/4 to O.6 r. 2 of the Supreme Court Practice 1967 at page 35 defines a "liquidated demand" as follows:-

> "A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages".
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> The words "debt or liquidated demand" do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (Knight v. Abbott, 10 Q.B. D. 11). A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of liquidated demand." (The underlining is ours).

The appellant's solicitors by a mistaken view of what constituted a liquidated demand entered up final judgment and on the face of it while that judgment stood, that was the end of the action.

The judgment which should have been entered up was an interlocutory one for damages and interest to be assessed.

Apart from the fact that we are of the view that the slip rule cannot be used in the instant case to correct a solicitor's error there is a fortiori another reason why we would dismiss the application. An irregular judgment should not be treated by the Court as a regular one and corrected under the slip rule.

Counsel has not addressed us on the legality or otherwise of the default judgment although we queried whether the judgment was regular.

This is now an academic question in view of the action taken by the appellant's solicitor after entering up the judgment.

They wrote to the respondent's solicitor demanding payment of the $11,000 and $65 costs which sums were promptly paid. There was no mention in the letter of demand for settlement of the judgment of any claim for payment of interest. The claim for $65 costs was also a mistake. The correct sum was $25.

Notwithstanding this state of affairs the appellant's solicitors then took out a summons seeking summary judgment under O.14 for the interest claimed in the statement of claim. The application purported to be in the action in which final judgment had been entered sealed and perfected.

The application purported to be pursuant to O.14 r. 2. The rule is as follows:-

> 2. - (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to the claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
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> (2) Unless the Court otherwise directs, an affidavit for the purpose of this rule may contain statements of information or belief with the sources and grounds thereof.
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> (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day."

Under O.14 rule 1 a plaintiff may apply for summary judgment. He must under rule 2 state his belief that there is no defence to his claim. This is mandatory.

In the instant case, Mr. Kamal Kumar, employed by the appellant's solicitors, purported to swear to facts on behalf of the appellant. He does not state that he

was authorised on behalf of the appellant to make the affidavit on its behalf nor does he state his belief that the respondent had no defence to the claim. He merely states:-

> "11. THAT I am informed and verily believe that the abovenamed Plaintiff is entitled to interest as claimed in the Statement of Claim filed herein."

Before a plaintiff can proceed under O. 14 it must be supported by an affidavit which complies with the rules otherwise it may be dismissed (see Lagos v. Grunwaldt (1910) 1 K.B. 41 C.A.). In the instant case it does not comply with O. 14 r. 2. Mr. Kumar also does not state the source of his information as required by r. 2(2).

Furthermore the affidavit in support may be made by the plaintiff or a person duly authorised to make it. If not made by the plaintiff the affidavit must itself state that the person making it is duly authorised to do so (Chirgwin v. Russell (1920) 27 T.L.R.C.A. The affidavit did not meet this requirement.

A further requirement is that the affidavit must verify the facts on which the claim to which the application relates is based. Mr. Kumar's affidavit did not meet this requirement. The purpose of his affidavit was to explain the steps taken by him to enter judgment by default for the interest and the fact that the respondent had paid the judgment debt of $11,000 and $65 costs.

The application under O.14 does not comply with the rules in many respects and should have been dismissed. The point was not taken in the court below or adverted to by the learned Judge in his judgment nor was it raised before us. The learned Judge dismissed the application on other grounds which we shall consider.

The respondent in the court below argued that the judgment was final and the court had no jurisdiction to

entertain the appeal. The learned Judge stated that the strength of this argument depended on whether the judgment entered was final or an interlocutory one. He found that the judgment was a final one but did not specifically state he had no jurisdiction to entertain the application. He dismissed the application on the facts.

The application could have been dismissed on the grounds that the court had no jurisdiction to entertain it. He did however state that the appellant should have applied for interest to be assessed by the Court when entering up judgment.

The application could also have been dismissed on the grounds that the application in support was defective but that point was not taken by the learned Judge.

We come now to consider the only ground of appeal which is as follows:-

> "1. The Learned Judge erred in law in holding that the Appellant was not entitled to claim interest under Law Reform (Miscellaneous Provision) (Death & Interest) Act after final Judgment had been entered on the claim against the Respondent and thereby failed to appreciate that jurisdiction of the Court to award interest under Section 3 arises after a Judgment is entered.

The learned Judge stated as follows:-

> "The cases cited by the plaintiff are certainly support for the proposition that interest may be awarded even when and at the time when judgment is entered by default, but do not help in the present situation where the plaintiff asked for and allowed judgment to be entered without any reference to interest."

The inference to be gathered from this statement is that the learned Judge considered the judgment a final one.

The ground of appeal in the last four lines raises legal argument and should not have been included. Mr. Young does not state what type of judgment he refers to. Is it final or interlocutory judgment? The extract from the learned Judge's judgment indicates that interest may be awarded "even when and at the time when judgment is entered by default". Interest can also be awarded after interlocutory judgment has been entered up for damages to be assessed.

Mr. Young relies on the case of Jai Prakash Narayan v. Savita Chandra Civil Appeal 32 of 1985 F.C.A. That was a case however where the plaintiff correctly entered up judgment for $5000 with interest to be assessed.

The case is authority for the proposition that interest can be awarded on an Order 14 application for judgment. It is no authority for Mr. Young's contention that having entered up final judgment he can later apply under O.14 for judgment for interest on the final judgment.

Gardiner Steel Ltd v. Sheffield Branches (Projects) Ltd 1978 3 All E.R. 399 dealt mainly with the issue whether an O.14 application concluded by summary judgment was proceedings "tried in the Supreme Court". It was an appeal from the refusal by the Court to award interest at the time the application was granted.

The head notes to Alex Lawrie Factories Ltd v. Modern Injector Moulds Ltd (1981) 3 All E.R. 658 would appear at first to support Mr. Young but a perusal of the judgment indicates that final judgment was entered for a stated sum "and interest to be assessed by the master".

None of the cases cited by Mr. Young assist him.

Having entered judgment for $11,000 and $25 costs and that judgment having been fully satisfied by the respondent, there was no legal basis for a further claim for interest in the action.

The appeal is dismissed with costs to the respondent.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal