

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 359 of 2015

**BETWEEN** : THE TRUSTEES FOR ARYA PRATINIDHI SABHA OF FIJI a religious body registered under the Religious Bodies Registration Act Cap 68 having its head office at Suva.

PLAINTIFF

**AND** : TRUSTEES OF BULA FIJI TOURISM EXCHANGE an incorporated trust under the Charitable Trust Act and having its registered office at 56 Grantham Road, Suva.

DEFENDANT

**BEFORE** : Master Vishwa Datt Sharma

**COUNSEL** : Mr. Vijay Maharaj for the Plaintiff  
Non Appearance of the Defendant

Date of Hearing: 31<sup>st</sup> May, 2016

Date of Ruling : 04<sup>th</sup> July, 2016

**RULING**

*[Whether court record shows any Application for Assessment of Damages pursuant to Order 37 High Court Rules, 1988]*

**A. INTRODUCTION**

1. The Plaintiff's Counsel, informed the Court on 31<sup>st</sup> May, 2016, that the impending application before this court was a **Summons for Assessment of Damages**.

2. This Court upon a thorough perusal of the Court file has been unsuccessful in locating any Summons filed by the Plaintiff seeking for the Assessment of Damages in this case.
3. The Plaintiff's Counsel explained Court that he wrote a letter to the High Court Civil Registry on 17<sup>th</sup> February, 2016, pointing out that he would seek leave of the Court (which he now does) to amend the Summons under Order 14 to a Summons for Assessment for Damages based on Justice Scott's Judgment: *HBC 0383 of 1997 Consort Shipping Line Limited vs., Fai Insurance*.
4. However, this Court decided in the circumstances to hear the Counsel instead, since he had filed a written submissions on 14<sup>th</sup> March, 2016 and that his Summons for Summary Judgment be **amended** to a Summons for Assessment of Damages.

**B. THE LAW**

5. The provisions of Law dealing with the Assessment of Damages can be found at Order 37 of the High Court Rules, 1988 which states as follows-

**Assessment                      of                      damages                      (O.37,                      r.1)**

*1.(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the Registrar and, at least 7 days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is given, proceed accordingly.*

*(2) Notwithstanding anything in Order 65, rule 9, a notice under this rule must be*

served on the party against whom the judgment is given.

(3) Without prejudice to the powers of the Registrar under Order 32, rule 12, the attendance of witnesses and the production of documents before the proceedings under this Order may be compelled by writ of subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at a trial.

**Certificate of amount of damages (O.37, r.2)**

2. Where in pursuance of this Order or otherwise damages are assessed by the Registrar, he shall certify the amount of the damages and file the certificate in the Registry.

**C. ANALYSIS and DETERMINATION**

6. I have perused the Court Record in the within Action and thus set out the Chronological events of the case so far as follows-

7.

(i) The Plaintiff commenced proceedings by filing a Writ of Summons and a Statement of Claim on 20<sup>th</sup> November, 2015 and sought for the following orders-

- (a) An order for an immediate vacant possession of the property;
- (b) Rental arrears in the total sum of \$14,312-75 as at 31<sup>st</sup> July, 2015;
- (c) Mense Profit at the rate of \$7155-55 per month from 1<sup>st</sup> August 2015 until the Defendant gives vacant possession;
- (d) Costs;
- (e) Interest pursuant to Law Reform Miscellaneous (Death & Interest Act);
- (f) Such further and other relief this Honourable Court may grant in the circumstances of the case.

- (ii) An amended Statement of Claim without leave filed (since the Defendant was yet to be served with the initial Writ of Summons).
- (iii) Summons for Summary Judgment application filed on 02<sup>nd</sup> December, 2015.
- (iv) Summons for Summary Judgment application together with an affidavit in support and an amended statement of claim served on Andrew identified as the Manager of the Incorporated Trust (Defendant).
- (v) Search for Acknowledgment of Service or Statement of Defence filed with a Praecipe and a Judgment by Default on 26<sup>th</sup> February, 2016.
- (vi) The Judgment by Default was signed and sealed by the Chief Registrar on 02<sup>nd</sup> March, 2016. It is noted that the Judgment by Default states as follows-

'No acknowledgment of service and or statement of defence having been filed by the Defendant herein, it is this day adjudged that the Defendant do pay the Plaintiff damages and interest to be assessed.' (Underline is mine).

- 8. According to the Plaintiff Counsel's written submissions filed in Court on 14<sup>th</sup> March, 2016, he informs Court that he filed a Summons under **Order 14 of the High Court Rules for Summary Judgment** with an affidavit in support in the mistaken belief that the Defendants had filed an Acknowledgment of Service. He explains the reason why he say mistaken belief, because Order 14 Rule 1 states that Plaintiff may make an application for Summary Judgment after the defendant has given Notice to Defend.
- 9. The Counsel states further that he wrote to the High Court Civil Registry on 17<sup>th</sup> February, 2016 pointing out that the application for Summary Judgment was filed in error in the belief that the Defendants had already filed an Acknowledgment of Service (which turned out not to be the case).
- 10. He further informs Court that in this letter he also pointed out that he would seek leave of the Court to amend the Summons under Order 14 to a Summons

for Assessment of Damages based on Justice Scott's judgment as in case *HBC 0383/97- Consort Shipping Line Limited v, Fai Insurance*.

11. The Plaintiff filed a Judgment by Default pursuant to **Order 13 Rule 1 of the High Court Rules, 1988** on 26<sup>th</sup> February, 2016. O.13 r.1 states-

*'1-(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.'*

12. The Plaintiff further states in his written submissions that as a result of the entry of Judgment by Default, **each of the reliefs, except for costs and interests**, sought by the Plaintiffs is deemed to have been entered against the Defendants.

13. The Plaintiff's contention in terms of **First relief** is for vacant possession wherein the Plaintiff has an **Approval Notice of Lease**, and in the absence of any defence or objection by the Defendant is therefore sufficient prove that the Plaintiff is the lessor of the subject land. Also a 5 year tenancy agreement has expired on 31<sup>st</sup> July, 2015.

The Plaintiff's **second relief** is for rental arrears in the total sum of \$14, 312-75.

**Third relief** is for mense profit from 1<sup>st</sup> August, 2015 in the sum of \$7155-55 per month until the Defendant give vacant possession.

**Fourth Relief** claimed is for interests on the amount claimed and adds under **Order 13 Rule 1**, this Court can award **interests** at the rate of 5% up to the time of Judgment.

14. I now make reference to the Plaintiff Solicitor's correspondence addressed to the Senior court Officer, Suva, dated 17<sup>th</sup> February, 2016 wherein the writer admits at paragraphs 4 and 5 that he had applied for Director of Lands consent on 16<sup>th</sup> November, 2015 but the consent was not granted until very recently on 12<sup>th</sup> February, 2016.

The proceedings was commenced by a Writ of Summons and Statement of Claim on 20<sup>th</sup> November, 2015 when the Plaintiff had the knowledge that he did not have the locus standi to do so because the Consent was yet to be granted in respect of the lease which is the subject matter of the proceedings.

That is the Plaintiff sought for vacant possession against the Defendant when the Plaintiff was in fact not issued with a consent as at the time of the filing of this proceedings. Even when the Plaintiff filed and served an amended Statement of Claim on 02<sup>nd</sup> December, 2015, still the Plaintiff was aware that the director of lands is yet to grant any consent as sought for.

15. I would rather move on since this is not the issue before this court for me to decide on. The issue that I have to decide is whether there is a Summons for Assessment of Damages against the Defendant as the Plaintiff Counsel claims herein?

16. Now, when the Plaintiff filed in a **Judgment by Default** on 26<sup>th</sup> February, 2016, in absence of any Acknowledgment and Defence, it was **adjudged that the Defendant do pay the Plaintiff damages and interest to be assessed.**

When reference is made to the Plaintiff's initial Writ of Summons and Amended Statement of Claim, **there is no claim for any damages**, rather what is sought at paragraph 9 in terms of prayers at (b), (c), (d) and (e) are as follows-

- (b) **Rental arrear totalling to \$14, 312-75 as at 31<sup>st</sup> July ,2015;**
- (c) **Mense Profit at the rate of \$7155-55 per month from 1<sup>st</sup> August, 2015 until the Defendant gives vacant possession;**
- (d) **Costs; and**
- (e) **Interest pursuant to Law Reform Miscellaneous (Death & Interest Act).**

17. The Plaintiff's contention is that **Mense Profit** is the loss suffered by the Plaintiff each month in the form of **loss of rental** due to the Defendant's continued occupation. He further interpreted the term "**mense profit**" as

18. "**Damages**" and that is why he is seeking for Assessment of Damages instead.

Mense Profit as per the Authority provided for by the Plaintiff's Counsel in **Woodfall R-34 (1995)** is expressed as "name given to damages for trespass where the trespasser is a former tenant of the landowner. If the tenant holds over after the termination of his tenancy, he is liable to pay mense profits.

19. **Mense profit, Rental Arrears and Interest** as claimed for by the Plaintiff within his Writ of Summons is a "**liquidated demand**" and **Order 13 Rule 1 and 2** respectively states as hereunder-

*1-(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.*

*(2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason only that part of the claim is for interest accruing after the date of the writ at an unspecified rate, but any such interest shall be computed from the date of the writ to the date of entering judgment at the rate of 5 per cent.*

20. In fact the Plaintiff erred when asking Court to seal the **Judgment by Default** for "**Damages**" when he should have sought **Judgment by Default** for **Mense profit, Rental Arrears and Interest** instead, since these claims were of "**liquidated Nature.**" This would have taken care of the **prayers sought at (b) to (e) inclusive** within the Writ of Summons.
21. Further, there was no need for the Plaintiff to file and serve the Summons for Summary Judgment because the Defendant had neither filed any **Acknowledgement of Service** nor a **Defence**.
22. Reference is made to **Order 14 Rule 1 of the High Court Rules, 1988** which clarifies this issue as follows-

'1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

23. Further, the Plaintiff submitted in his written submissions that he was seeking for Court's **leave to amend** the **Summons** filed pursuant to **Order 14 of HCT Rules, 1988** to a **Summons for Assessment of Damages**.
24. No formal application was filed and served on the Defendant to seek such leave for amendment and therefore this court is not in a position to accede to the Plaintiff's oral application in terms of his written submissions.
25. If the Plaintiff's Counsel was in fact serious about seeking this amendment, then it would have been a futile exercise indeed. The reason being and I reiterate, that the **Plaintiff never sought for any damages** as such in his Writ of Summons and the Statement of Claim filed in this proceeding. He rather sought for Rental Arrears, Mense Profits, Costs and Interests which all fall within the category of a '**Liquidated Demand** or Claim.

Since the Defendant had failed to file and serve any **Acknowledgment of Service and Defence**, then the Plaintiff could have easily proceeded for a Judgment by Default in terms of **Order 13 Rule 1 and 2 of the High Court Rules, 1988** accordingly. This was not done so by the Plaintiff.

26. I find as a fact that there is no evidence of any application by **Summons For Assessment of Damages** filed by the Plaintiff and therefore this court is unable to accede to the Plaintiff's oral application by written submissions to amend the Summons for Summary Judgment to that of a Summons for Assessment of Damages since it would be wrong in Law especially bearing in mind



the nature of claims sought for by the Plaintiff within his Writ of Summons and Statement of Claim.

27. For the aforesaid rational, I make the following orders, accordingly.

**ORDERS**

- (i) **The Plaintiff's Summons for Summary Judgment filed pursuant to Order 14 of the High Court Rules, 1988 is hereby Dismissed.**
- (ii) **The Plaintiff's Writ of Summons and the Statement of Claim including the Amended Statement of Claim is hereby Dismissed since there was no consent granted to the Plaintiff by the Director of Lands and therefore the Plaintiff did not have any Locus Standi in Law to commence this proceeding.**
- (iii) **There will be no order as to costs at the Discretion of this Court.**

Dated At Suva This 04th Day of July, 2016.



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**MR VISHWA DATT SHARMA**  
Master of High Court, Suva

cc: *MC Lawyers, Suva. (Plaintiff).*  
*Trustee of Bula Fiji Tourism Exchange (Defendant).*