

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 16 of 2016

BETWEEN : **YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF**
FIJI (INCORPORATED), a charitable trust duly
registered pursuant to the Charitable Trust
Ordinance and having its registered office at 3 Des
Vouex Road, Suva.

PLAINTIFF

AND : **ST. AUBYN LIMITED** a limited liability company
duly incorporated in Fiji and having its registered
office situated at BDO Zarin Ali, Level 8, Dominion
House, Thompson Street, Suva.

DEFNDANT

Appearances : Siwatibau and Sloan for the Plaintiff
Neel Shivam Lawyers for the Defendant

Ruling : 31 January 2017

RULING

1. By summons dated 11 March 2016 and pursuant to Order 19 Rule 9 of the High Court Rules, the Defendant seeks the setting aside of a default judgment entered against it on account of its failure to file a defence.

Background

2. The Plaintiff instituted these proceedings on 25 January 2015 by filing a writ of summons and statement of claim for, inter alia, arrears of rent; an order for the Defendant to pay to the Plaintiff rent at the rate of \$5,000 per week from 18 January 2016 to the earlier date of

completion of the works, or further order of the Court; special damages of \$216,702.07; an order for the Defendant to furnish audited accounts of its income and expenses from its operation on the second floor of the property from May 2013 to date; mesne profits; general damages for breach of contract and prevention of completion to be paid by the Defendant; an order extending the time for completion of the works by the Plaintiff; interest at the rate of 6% per annum, and costs of this action on a solicitor client basis.

3. On the same day, the Plaintiff filed an application for interlocutory injunction against the Defendant to compel it to commence paying rent to the Plaintiff in the amount of \$5,000 per week from 18 January 2016 until further order of the Court, the determination of this action, or the completion and certification of the works pursuant to the Mediated Agreement; to restrain the Defendant from withholding any further rent from the Plaintiff on any basis until further order of the court; that the Defendant within 14 days, pay into the Chief Registrar's interest account the sum of \$523,441.54 in partial rental arrears until determination of both this action and that in HBC 68 of 2013; that the Defendant pay the costs of this application, and; such further direction and or orders as the Court may deem just.
4. On 2 February 2016, the Defendant acknowledged service of the writ and indicated its intention to defend the action.
5. On 4 March 2016, the Plaintiff entered a search of the Court file and finding no statement of defence there, promptly entered default judgment against the Defendant on account of the failure of the latter to file a defence.
6. A week later on 11 March 2016, the Defendant filed this summons to set aside the default judgment of 4 March 2016.

7. On 17 March 2016, the Plaintiff filed a notice for assessment of damages.
8. The summons for injunction for rent was set for hearing on 23 March 2016 but did not proceed after counsel for the Defendant told the Court that the reliefs had all been granted in terms of the default judgment.

The law

9. The law on setting aside in this jurisdiction is settled. Where a default judgment has been entered regularly or in compliance with the Rules, the defendant is required to show an affidavit of merits in order to succeed in setting aside the default judgment. (*Fiji Sugar Corporation Ltd. v Ismail* [1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988).
10. Where the default judgment has been entered irregularly, the defendant is entitled to have it set aside as of right without condition. (*White v Weston* [1968] 2 Q B 647; *Anlaby v Praetorious* (1888) 20 Q.B.D. 764 at page 769 per Fry L.J.; *Fiji Development Bank v Lal* HBC 273 of 2012 per Kumar J)
11. The Court has no discretion to refuse to set aside an irregular judgment. (*Anlaby v Praetorious* (supra))

The default judgment

12. The default judgment is as follows:

NO STATEMENT OF DEFENCE to the Plaintiff's claim having been filed and/or served by the Defendant herein **IT IS THIS DAY ADJUDGED** that (i) there be judgment for the Plaintiff in the sum of **\$523,441.54** in rental arrears and the Defendant is ordered to pay the said sum of **\$523,441.54** to the Plaintiff forthwith, and (ii) that there be interlocutory judgment for the Plaintiff for special damages, mesne profits, general damages, interest and costs to be assessed.

Regular or irregular judgment?

13. Though the Defendant had filed an acknowledgement of service showing an intention to defend the proceedings, it failed to file a statement of defence. Order 19 of the High Court Rules provides the procedure for entering judgment in default of pleadings.
14. The Plaintiff's claim includes not only liquidated and unliquidated claims which fall within rr. 2-5 of Order 19. The Plaintiff also seeks an order for the Defendant to furnish audited accounts of its income and expenditure from May 2013 to date, and an order extending the time for completion of the works by the Plaintiff. These claims are outside the scope of rr. 2-5 above and, pursuant to Order 19 Rule 7, require the Plaintiff to apply to the Court for judgment. Such application must be by way of summons or motion.
15. In *Air Fiji Ltd v Shandil* Civil Action No. HBC 32 of 2011, Shameem J stated:

Order 19 Rule 7 applies to claims which are **neither liquidated nor unliquidated**, and the court, before entering judgment is required to consider what part of the claim the plaintiff is entitled to on default judgment.
16. In this case, the default judgment filed by the Plaintiff was only for the liquidated and unliquidated claims. Of course, a Plaintiff is free to choose the reliefs he wishes to pursue and those to abandon without any duty to give notice to the other party (ies). However, it cannot enter judgment by default unless it expressly and finally abandons every claim that falls outside rr. 2 – 5. (*Morley London Developments Ltd. v Rightside Properties Ltd* (1973) 231 E.G. 235, CA) The default judgment must make it clear on its face that the inappropriate claims have been abandoned.
17. The default judgment in this case makes no reference to the claims outside rr 2 – 5, let alone that they have been abandoned. The failure to file a defence to a claim that falls within rule 7 of Order 19 cannot

result in judgment without an order of the Court. For this reason, I hold that the default judgment entered by the Plaintiff on 7 March 2016 is irregular and must be set aside as of right and without condition.

18. It follows that the Notice for Assessment of damages filed by the Plaintiff on 30 March 2016 must be and is hereby struck out.

Orders

1. The default judgment sealed 7 March 2016 is irregular and is set aside.
2. The Notice for Assessment of damages filed 30 March 2016 is struck out.
3. No order as to costs.
4. Case adjourned to 09 February 2017 at 9.00am for directions on the filing of pleadings.




S.F. Bull
Acting Master