

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 61 of 2016

BETWEEN : MODERN ALUMINIUM & GLASS (FIJI) LIMITED
PLAINTIFF

AND : BINESH KUMAR and NAZREEN NISHA
DEFENDANTS

APPEARANCES/REPRESENTATION

PLAINTIFF : Not Present [Shelvin Singh Lawyers]
FIRST DEFENDANT : Default Judgment Entered
SECOND DEFENDANT: Ms Mataika [Legal Aid Commission]
RULING BY : Acting Master Ms Vandhana Lal
DELIVERED ON : 25 March 2022

RULING

[Setting Aside Judgment By Default]

1. The Plaintiff on 15th March 2016 caused a writ of summon to be issued against the Defendants.

The claim was for a sum of \$83,829.56 for goods allegedly jointly stolen by the Defendants who were employed by the Plaintiff.

It is claimed that the Plaintiff became aware of the said theft during an audit carried out on 22nd April 2010 and the matter was referred to the Police for prosecution.

2. The Second Defendant had acknowledged service of the writ on 28th November 2016.

3. Later on, 17th January 2017 a judgment by default was sealed against both the Defendants for the sum so claimed.
4. On 14th May 2019 the Second Defendant made the current application for setting aside of the said judgment on the grounds of irregularity and that copy order was not served on her
5. The Second Defendant submits that since the claim was for goods fraudulently appropriated, the judgment so entered is irregular.
6. In **Philips & Co [A Firm] v Bath Housing Cooperative Ltd [2013 2 ALL ER 475** the English Court of Appeal [Civil Division] expanded the scope of liquidated claim from its conventional limit, to indicate certain forms of damages within the meaning of liquidated claims. The Court of Appeal stated:

“There is therefore some scope for debate as to the width of the word "debt" in this context. As for the word "liquidated", I would take it that, in ordinary legal usage, this requires that the liability should be for an ascertained amount. Most liquidated claims would be for a debt. Obvious examples include the outstanding principal and unpaid interest (at a contractual rate) on a loan, and sums due by way of rent or hire, and the price of goods (if specified in the contract). Conventionally, unliquidated claims are normally in damages. Some damages claims, however, may be liquidated. A good example is a building contract which has a liquidated damages clause defining the builder's liability if the work is not completed by the stipulated finishing date.

In Amantilla Ltd v Telefusion PLC (1987) 9 Con LR 139 His Honour Judge John Davies Q.C. sitting on Official Referees' Business held that a builders' claim for a quantum merit was a claim within section 29(5). He said this on the point:

"If the parties themselves cannot agree on what is a reasonable sum, the contractual obligation to pay such a sum provides a sufficiently certain and definitive datum to enable the court to ascertain its amount by calculation and circumstantial (or "extrinsic") evidence, in accordance with the terms of the contract and without any further agreement of the parties. Indeed, it would be remarkable for the law to impose such an obligation if it did not have those attributes.

A quantum merit claim for a 'reasonable sum' lies in debt because it is for money due under a contract. It is a liquidated pecuniary claim because 'a reasonable sum' (or a 'reasonable price' or 'reasonable remuneration') is a sufficiently certain contractual description for its amount to be ascertainable in the way I have mentioned ... Such a claim is different in kind from its opposite, which is a claim for unliquidated damages. The former is a claim for a specific sum, namely a reasonable sum due under a contract; it is no less specific for being described in words rather than in figures, provided it is sufficiently defined to be ascertainable - which it is, as I have already explained. The task of the court, if it has to assess such a sum, is one of translating the words of the contract into figures in order to effectuate the intention of the parties. The nature of a claim for unliquidated damages is wholly different. The function of the court is not one of interpreting the contract but of deciding, in accordance with legal principles, what compensation, if any, should be paid to redress any harm done by its breach. It is for these elemental reasons that a quantum merit claim is a liquidated pecuniary claim, whilst conversely a claim for

unliquidated damages is not, and cannot be such, even though it be claimed at a definite figure."

7. In **Micmerah Int'l Agency Limited v A-Z Ret. Products Limited [2012] Z.N.W.L.R pt 1338, 357** defined the term liquidated money demand as:

debt or specific sum of money usually due or payable and its amount must be ascertainable or capable of being ascertained as a matter of arithmetic without any other or further investigation.

8. In **Odume v Nnachi [1964] 1 A11 NLR 329** the factors for determining a liquidated sum were outlined as follows:

- (i) The sum must be arithmetically ascertainable without further investigation.*
- (ii) It is with reference to a contract, the parties to the contract must have mutually and unequivocally agreed on fixed amount payable on breach.*
- (iii) The agreed and fixed amount must be known prior to the breach.*

9. **Atkins Court Forms; 2nd Edition, Volume 14, 1996 Issue at page 324** states that in order to ascertain a debt is liquidated or not:

"the key question is not in the definition of the claim, but in the manner of calculation. Even though a claim is for a definite sum, it will not be a liquidated claim if some exercise of inquiry by the Court must be undertaken in the calculation of the amount for which the judgment is sought. In such a case, even though for a specified sum, will in reality be a claim for unliquidated damages requiring assessment."

10. On paragraph 5 of the statement of claim, the Plaintiff has pleaded as follows:

The Plaintiff claims the sum of \$83,829.56 being monies had and received by the Defendants on behalf of the Plaintiff or alternatively, being the value of the goods fraudulently appropriated by the Defendants from the Plaintiff.

Particulars

To be provided on completion of discovery.

11. The Second Defendant's counsel submitted that the claim by the Plaintiff is for fraudulent misappropriation of goods and the Plaintiff claims from the Defendants the value of the goods. Hence, the Plaintiff should have made an application under Order 19 rule 7 of the High Court rules.
12. Though the claim has been quantified, I find this to be a claim of unliquidated nature for following reason: the allegation is that said sum was fraudulently misappropriated by the Defendant. Hence it was prudent for the Plaintiff under Order 18 Rule 11(2) of the High Court Rules to give particulars of the monies so misappropriated. This was not pleaded in the claim. Instead, the Plaintiff pleaded to provide the particulars on completion of discovery.
13. Hence, I find the judgment so entered to be irregular and ought to be set aside.

Does the Second Defendant have a meritorious defence?

14. Despite holding the judgment to be irregular I will also make findings whether there is or not a meritorious defence raised by the Second Defendant to the claim.
15. According to the Second Defendant, in a criminal proceeding only the First Defendant was charged and the amount that was allegedly fraudulently appropriated was in the sum of \$9,000.

She was never charged for the allegation as she was a state witness.

In her draft defence she claims to have assisted the Police in prosecuting the First Defendant and either wise made a bear denial of the claim.

16. In response, the Plaintiff states that it had lodged a complaint with the police for prosecution of both the Defendants.
17. I find the Defendant has raised doubts regarding the quantum of the monies allegedly misappropriated and the Plaintiff ought to be heard on evidence to support its claim of \$83,829.53.

Has the Reason for Delay Being Explained?

18. According to the Second Defendant, she was in Tonga for work purposes and hence her solicitors could not contact her and had closed her file with the commission.
19. It is the duty of a party to keep in contact with his/her solicitors regarding the states of court proceedings and if he/she is required to file necessary document in court.
20. Definitely her counsel would have advised her that she is required to file her Statement of Defence within 28 days of service of the Writ.
21. Hence it was responsibility the Second Defendant to give proper instruction prior to her departure to Tonga or from Tonga.

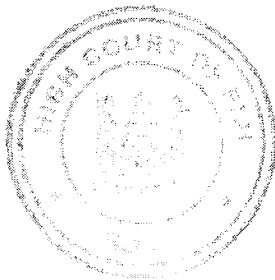
Conclusion

22. Though she has not provided a sufficient reason for not filing her defence on time and the delay in making this application, the judgment so entered on 17 January 2017 ought to be set aside on the grounds of irregularity and there being a defence raised by the Second Defendant.

Orders

23. The default judgment sealed on 17th January 2017 is set aside wholly with cost in cause.

24. The Second Defendant is to file/serve her defence by 4pm 08 April 2022;
25. The Plaintiff is to file/serve a reply to defence by 4pm 19 April 2022.
26. A summons for direction is to be filed and served under the rules and before the next court date.
27. The Plaintiff can file an interlocutory judgment against the First Defendant.




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Vandhana Lal [Ms]
Acting Master
At Suva

TO:

1. **Suva High Court Civil Action No. HBC 61 of 2016;**
2. **Shelvin Singh Lawyers, Solicitors for the Plaintiff;**
3. **Legal Aid Commission, Solicitors for the Second Defendant.**