QQQ HOLDINGS LIMITED, SULLIVAN (SI) LIMITED AND Y. SATO & COMPANY LIMITED -V- HONIARA CITY COUNCIL

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No, 039 of 2003

Date of Hearing: 30th April 2003
Date of Judgment: 1st May 2003

Mr A. Radclyffe for the Plaintiffs
No appearance for the Defendants

JUDGMENT

Kabui, J: This is an application by the Plaintiffs filed on 15th April 2003 by way of a Motion for judgment under Order 29, rule 8 of the High Court (Civil Procedure Rules) 1964 "the High Court Rules." Rule 8 of Order 29 above states-

"...**In all other actions than those in the preceding Rules of this Order mentioned, and those to which Rule 14 of this Order applies, if the defendant makes default in delivering a defence, the plaintiff may set down the action for judgment and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled**..."

I would underline the words "such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled ".

The brief facts.

The Plaintiffs are wholesale and retail traders in Honiara in general merchandise including the sale of liquor upon liquor licences being issued by the Liquor Licensing Board for Honiara City. In January, 2002, the wholesale liquor licence fee was in the amount of $5,000.00 whilst the fee for a retail licence was in the amount of $3,000.00 respectively. The Plaintiffs paid their respective fees accordingly for that year to the Defendant. Later in that same year, the fees were increased and were paid by each Plaintiff under protest on account of the fact that the increase had not been sanctioned by the relevant legislation and published in the Solomon Islands Gazette. The fees were again increased for 2003 and again each Plaintiff paid the fee under protest. The Plaintiffs claim that the fee increases for 2002 and 2003 had been imposed ultra vires the provision of the relevant legislation and in breach of the statutory duty to charge those fees on wholesale and retail traders in Honiara.

Is a motion for judgment under Order 29, rule 8 of the High Court Rules, the correct procedure in this case?

I return to the words in rule 8 that I underline above in answering the question of when to use the procedure in rule 8 of Order 29 of the High Court Rules. First of all, the procedure under Order 29, rule 8 above is not mandatory but permissive only. (See **Harold Tarasel v. Edwin Kariuvi and Others**, Civil Case No. 262 of 1997) (unreported). At page 301 in Australian Civil Procedure, by Bernard C. Cairns 1980, the learned author says-

"...**A motion for judgment may not provide the plaintiff with all the relief he needs, or indeed with any relief at all. In that sense it is well established that the default procedure is permissive only, it is not mandatory. A plaintiff who desires to do so need not move a motion for judgment, but may have the matter listed for hearing as if the defendant had entered a defence**..."

So, the plaintiff in any case has to evaluate his or her chance of obtaining the relief being sought by way of a default procedure or by going to trial even if the defendant has not delivered a defence. The decision to embark upon the default procedure or not would seem to depend upon the nature of the relief being sought. Seeking a declaratory order from the court is seeking an equitable relief upon which the court will exercise its discretion. In my view, it is important that the court is given evidence upon which it can exercise its discretion. Reliance upon the statement of claim alone as is required in rule 8 of Order 29 above for the purpose of deciding to grant an equitable relief such as granting a declaratory order can be problematic. A case in point on this was **Grant v. Knaresborough Urban District Council** [1928] 1 Ch.310. In that case, the plaintiff commenced action against the defendants seeking a declaratory order against the defendants. The ground upon which that declaratory order was sought was that the form of return required by the defendants was illegal, unauthorised and ultra vires the Rating and Valuation, Act, 1925 of the United Kingdom. The defendants withdrew all their notices but later on filed a defence denying invalidity of the notices. The matter was set down for trial but the defendants withdrew their defence saying they did no wish to contest the action. The plaintiff did not apply for a judgment in default of defence but proceeded to trial on the basis that evidence was required to prove the allegation against the defendants apart from the need for argument arising from the evidence. At page 317, Asbury, J. said-

"...**The declaration asked involved evidence as to the invalidity of the form issued under the Act and the Court would not have made a declaration of that nature on a motion for judgment in default of defence without evidence and argument**..."

In another case, **Austen v. Wilding** [1969] 1 W.L.R.67, the plaintiff commenced an action seeking a declaration that she was entitled to ownership and possession of a certain land as against the defendant. The defendant did file an appearance but did not serve a defence

whereupon the plaintiff by motion applied for a date to be fixed for the speedy trial of the action. The Court granted the application and ordered the action to be set down for trial. Yet, there is another case, **Nagy v. Co-operative Press, Ltd.** [1949] 1 ALL E.R. 1019. In that case, the defendant failed to deliver a defence to a claim for an injunction and damages in a libel action. Instead of applying for a judgment in default of defence, the plaintiff applied for directions for the action to be tried by a judge and special jury. That order was accordingly granted by the master. In the judgment on an appeal against that order, Cohen, L. J., commenting on Order 27, rule 11 being the UK equivalent of Order 29 rule 8 of the High Court Rules, said at pages 1022-23-

"...I think the purpose of the rule was to provide a cheap method for the plaintiff to obtain in most cases the relief he seeks, but circumstances might well arise in which a real hardship would be inflicted on a plaintiff if he was compelled to proceed by a motion for judgment and could not exercise the right which he would otherwise have of setting down the case for trial and having it come on for trial in the usual way. For instance, some of the relief he sought might be relief of a kind which it was not the practice of the Chancery Division to give on a motion for judgment, such, e.g. as a declaration as to the construction of a document..."

Clearly, in this case, the Plaintiffs are seeking declarations as to the validity of the fee increases for 2002 and 2003 which they allege are invalid for being contrary to section 3(3) of the Liquor Act (Cap. 144). The question of whether or not the fee increases are valid or not cannot be decided on the basis of the statement of claim alone. There ought to be evidence to prove the validity or otherwise of the fee increases for 2002 and 2003. The statement of claim is not that evidence. The claim for the reimbursement of fees paid for 2002 and 2003 totaling $26,000.00 each with interest claimed in the statement of claim can only be granted if it is proved that such fees had been illegally imposed without the proper legal basis. The need to call evidence to prove that with legal arguments in support of that evidence is but obvious in this case. The need for a summons for directions or the like is obvious in order to set the date for trial of this action. This application is dismissed. Cost will be cost in the cause.

F.O. Kabui,
Judge