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IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0067 OF 1998/S
(High Court Civil Action No.HBC261 of 1998)

BETWEEN:

SURESH CHARAN — *Appellant (Original Plaintiff)*

AND:

NATIONAL INSURANCE COMPANY LIMITED — *Respondent (Original defendant)*

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice Kenneth R. Handley, Justice of Appeal

Hearing: **Tuesday, 3 August 1999, Suva**

Counsel: **Appellant in Person**
Mr. Kafoa Muaror for the Respondent

Date of Judgment: **Friday, 13 August 1999**

JUDGMENT OF THE COURT

This is an appeal by leave granted by Thompson JA on 27 November 1998 from Scott J.'s decision of 9 July 1998 whereby he set aside a default judgment entered against the respondent company and gave it leave to file a defence within 14 days. He awarded $50 costs to the Appellant, who had appeared in person.

The Appellant insured his car with the company. On 27 March 1996 his car was involved in an accident and he made a claim under the policy. The company ultimately agreed to repair the car but a dispute arose as to the amount which it was liable to pay for the repairs. As a result the car was not repaired and over two years later it had still not been repaired.

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On 14 May 1998 the Appellant issued a writ with a statement of claim attached, and served it on the company the same day. The claim was for both liquidated ($19,328.82) and unliquidated damages. The time within which an acknowledgment of service and notice of intention to defend had to be given was 14 days (see High Court Rules 1988 0.13 rr.5 and 7 read with 0.12 r.4). The company should have acknowledged service no later than 28 May 1998 (see 0.12 r.4 and 0.3 r.2(4)), but failed to do so in time. The acknowledgment is to be in Form No.2 in Appendix A as prescribed by 0.6 r.6 which requires the defendant to state whether he does or does not intend to contest the proceedings. Acknowledgment of service also constitutes an appearance. (0.12 r.9).

On Tuesday 2 June 1998 the Appellant entered default judgment against the company pursuant to 0.13 r.5 in the following form:-

> *"JUDGMENT IN DEFAULT OF ACKNOWLEDGEMENT OF SERVICE*
>
> *The 2nd day of June, 1998*
>
> *No appearance (acknowledgment of service) having been entered by the Defendant herein, it is this day adjudged that the defendant do pay the plaintiff the liquidated damages for the sum of $19,328.82 and the claim for unliquidated damages be assessed and costs.*
>
> *BY THE COURT*
> *DEPUTY REGISTRAR"*

On 3 June the Company filed an acknowledgment of service and on 22 June it applied for the default judgment to be set aside pursuant to 0.13 r.10. Scott J. having considered the affidavit evidence and the written submissions of the parties set aside the default judgment

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in a written decision dated 9 July. The Appellant applied to Scott J. to set aside his decision but this application was refused on 28 August. He then sought leave to appeal from this Court.

In his first decision Scott J. noted that counsel for the company acknowledged that the default judgment had been regularly entered, but that the form of judgment as entered was patently defective. He did not identify why this was so but had previously noted that counsel for the company had submitted that the former judgment was "clearly defective" since it did not take into account the plaintiff's duty to mitigate his loss. In answer to a question from the Court the appellant stated that during argument Scott J. had said that the appellant's claim under the policy was not for liquidated damages, a point which had been hinted at by counsel for the company in his submission about mitigation.

The appellant argued before Scott J. that the company's proposed defence was a sham, but the Judge held that it disclosed arguable or triable issues. Before us the appellant renewed his submission that the proposed defence was a sham in relation to both liability and quantum, but for reasons which will appear it is only necessary for us to deal with this submission as it relates to the question of liability.

The company's draft defence alleged that the plaintiff's policy expired on 29 December 1995 (par 2), it denied the plaintiff's allegation that it had renewed the policy (par 3), and claimed that after due notice, it was cancelled on 23 March 1996 for non payment of the renewal premium (pars 3 & 4). Somewhat strangely par 5 of the defence then stated that the company "agreed to repair the damage", and pars 9 and 13 pleaded that the non repair of the

plaintiff's car was due "entirely" to his non co-operative attitude.

Documents in evidence on the company's application to have the default judgment set aside established however that the company had "automatically" renewed the appellant's policy for 12 months on 29 December 1995 and had automatically renewed it again for a further 12 months on 29 December 1996. On each occasion it sent the appellant an account for the renewal premium, but the renewal was not expressed to be subject to payment of that premium. The correspondence in evidence includes a letter dated 8 February 1996 from the company to the appellant seeking payment of the renewal premium for the 12 months from December 1995. The letter did not suggest that the renewal of the policy had been conditional upon payment of the renewal premium.

The correspondence also included a letter from the company to the appellant dated 2 May 1996 which contained clear admissions of the existence of insurance cover at the time of the accident, and the company's obligation to pay for the repairs to the appellant's car. On the same day the company made a part payment to the appellant under the policy deducting the agreed excess in the policy of $200. On 15 May the company issued confirmation orders to Eskay Motors Ltd to carry out itemised repairs to the appellant's car for a cost of $9,698.83

This material establishes that the Company's foreshadowed defences to the appellant's action under the policy on the question of liability are without substance and that, to this extent, there is no triable issue. The company was therefore not entitled to have the default judgment set aside on the issue of liability.

The appellant's writ was indorsed with a claim for "damages". The statement of claim attached sought orders for payment of the sum insured of $20,500 "or ...alternatively the quoted repair charges for the sum of $19, 328.82", damages for loss of use of the car for eight weeks, aggravated damages and indemnity costs.

Order 13 r 1 provides that where a writ is indorsed with a claim "for a liquidated demand only", and the defendant fails to give notice of intention to defend, the plaintiff may enter final judgment. Rule 2 provides that where a writ is indorsed with a claim "for unliquidated damages only", and the defendant fails to give notice of intention to defend, the plaintiff may enter interlocutory judgment for damages to be assessed.

In this case neither rule applied as the writ was simply indorsed with a claim for "damages". However, r 5 deals with mixed claims, and provides (so far as relevant) that where a writ is indorsed with two of the claims mentioned in the foregoing rules and no other claim, then if the defendant fails to give notice of intention to defend the plaintiff may enter against that defendant "such judgment in respect of any such claim as he would be entitled to enter under those rules if that were the only claim indorsed on the writ." The writ was not indorsed with claims for a liquidated demand and for unliquidated damages but this was a mere irregularity which did not nullify the default judgment entered for both the liquidated claim and unliquidated damages. See O.2 r 1(1).

We have held that the company was not entitled to have the default judgment set aside on the issue of liability. The appellant argued strongly that in these circumstances he was

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entitled to retain the final judgment for "the liquidated damages" of $19,328.82. Counsel for the company submitted that there were triable issues on quantum, but did not challenge the appellant's right to claim liquidated damages against a motor vehicle insurer in a case such as this. Moreover no respondent's notice was given under r19 of the Court of Appeal rules challenging the existence of any liquidated demand.

Under r22(4) of the Court of Appeal rules the court may exercise its powers notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below, or that any ground for affirming or varying the decision of that court is not specified in such a notice. The court having considered the record and the written submissions of the parties formed the view that the appeal raised a question of law as to the existence of any liquidated demand in cases of this kind as was held in Alexander v. Ajax Insurance Co. Ltd [1956] VLR 436.

On this basis the case could have been one for the exercise of the court's powers under r.22 (4). Accordingly when the appeal was called on for hearing the court raised the question with the appellant and counsel for the company and referred them to the decision cited. The appeal was adjourned for a short time to enable the parties to consider the question, and the decision. When the hearing was resumed the appellant sought and was granted an adjournment to the following day to enable him to deal with the new point and the company's submissions which had been filed very late and out of time.

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On the second day of the hearing the appellant and counsel for the company were fully heard on all issues in the appeal. We are satisfied that, on the facts of this case, the appellant did not have a liquidated demand for $19,328.82, and as a matter of law had no liquidated demand at all. The appellant's claim for $19,328.82 comprised the amount of $9,698.83 covered by confirmation orders from Michael Associates on behalf of the company to Eskay Motors Ltd. (record p .61, 62 typed pagination) plus the 30% discount on new parts deducted in those orders ($1869.49) plus a further claim for $5118.72 (record p 66).

Para. 14 of the statement of claim pleads that this latter amount covered additional repair costs found to be necessary after the confirmation orders had been given when the appellant had temporary repairs carried out to his car. It was the subject of a quotation from Asco Motors which the appellant delivered to the company as he deposed in para 27(8) of his affidavit of 29 June 1998 (record p35 typed pagination). These amounts totalled $16,687.04.

It is clear therefore that the company's admissions by its agent Michael Associates only cover $9698.83. The appellant's claim in respect of the discount deducted by the company's agent ($1,869.49) and the later quote from Asco Motors ($5118.72) were not the subject of any admissions by the company proved in evidence. It is also evident that the balance of $2641.78 making up the amount of $19328.82 was not the subject of any admission by the company proved in evidence.

In these circumstances the final judgment for $19328.82 entered by the appellant could not stand in any event as there was no evidence that a claim for the whole of that amount

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had been liquidated by the acts or admissions of the company or its agent.

This analysis of the appellant's "liquidated" claim was strictly unnecessary, as we are satisfied that he had no liquidated demand against the company, his claim being, in law, a claim for unliquidated damages. This question was considered in Alexander v. Ajax Insurance Co Ltd [1956] VLR 436 which involved the validity of a default judgment entered by a plaintiff in an action for the sum insured under a fire policy following a total loss.

Sholl J. reviewed the English authorities dating from 1813 dealing with the nature of the claim by an insured under an indemnity policy. He held that such claims, except in the case of valued policy where there has been a total loss, "and except possibly ...where there has been a binding and conclusive adjustment of the claim before action brought" have uniformly been held to be claims for unliquidated damages and therefore not claims for a debt or liquidated demand. (ibid 445-6)

Authorities cited by Sholl J. also established that even the adjustment of the loss in such cases does not alter the legal character of the insured's demand. This was explained by Pearson J. [later Lord Pearson] in Jabbour v. The State of Israel [1954] 1 All ER 145, 150 :-

> ***"Such a claim is unliquidated because the plaintiff has to prove the amount, and even after an adjustment of the amount the plaintiff (unless he choose to sue on an account stated) must still prove the amount, using the adjustment as evidence because it involves an admission by the insurer, but such evidence might be rebutted, for instance by proof of a mistake."***

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The appellant referred us to a number of cases dealing with liquidated demands or claims decided since 1956 but none of these dealt with claims under insurance policies and none cast any doubt on the correctness of the decision in Alexander's case.

The appellant also argued that the admissions made by the company when it failed to file an acknowledgment of service within time covered the whole of his clam for $19,328.82. While this is correct, so far as it goes, these admissions cannot alter the legal character of the claim, and in particular cannot convert what would otherwise be a claim for unliquidated damages into a liquidated demand. In any event, the nature of the plaintiff's claim for the purposes of O.13 r 1(1) is fixed when the writ is filed, and the right to enter final judgment by default depends on the nature of the plaintiff's claim in the writ.

In our judgment therefore the final judgment for $19,328.82 cannot stand. The appropriate order is one amending the default judgment so that it stands as an interlocutory judgment for damages to be assessed and costs.

The appellant also appealed against the Judge's order that the company pay his costs assessed at $50.00. In support of that submission he provided us with a list of disbursements which included fees paid for the entry of the judgment, and the costs of the writ of execution which he issued against the company. Since he will now retain the default judgment as amended, including the order for costs which it contains, these costs should not be included in any order dealing with the costs of the application to set the judgment aside. Since

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he was not entitled to enter final judgment by default he was not entitled to levy execution, and should not recover the costs incurred in doing so.

The appellant nevertheless had incurred significant disbursements. It is not entirely clear whether the judge's order for costs was intended to be inclusive of disbursements or not. Although the amount involved is small, and we would not wish to encourage appeals on such questions, we think the judge must have overlooked the disbursements incurred by the appellant, or perhaps failed to make it clear that his order was intended to carry disbursements in addition to the sum fixed for costs. In our view justice would be done if the order for costs was varied to add an express entitlement to disbursements as agreed or as fixed by the Registrar in addition to the amount for costs ordered by the judge.

The appellant has succeeded in retaining his interlocutory judgment for damages to be assessed, and in obtaining a variation of the costs order made below. He is also prima facie entitled to the costs occasioned by the adjournment of the appeal because of the late filing of the company's submissions. However he failed in his attempt to have the final judgment reinstated. We make the following orders:

1. Appeal allowed in part.

2. Orders of the High Court including as to costs set aside.

3. In lieu thereof order that the default judgment entered on 2nd June 1998 be amended by striking out the words "the liquidated damages for the sum of $19,328.82 and the claim for" and adding the word "to" after "damages" so

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that the judgment stands as a judgment for unliquidated damages to be assessed and costs.

4. The respondent company is to pay the plaintiff's costs of the motion in the High Court to set aside the default judgment assessed as $50.00 plus the plaintiff's actual disbursements limited to filing fees as agreed or as fixed by the Registrar.

5. The respondent company is to pay the appellant's costs of this appeal and of the application to Thompson JA for leave to appeal which we fix at $400 plus the appellant's actual disbursements limited to filing fees and the cost of the preparation of the record.

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

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Justice Kenneth R. Handley
Justice of Appeal

Solicitors:

Appellant in Person
Cromptons, Suva for the Respondents

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