IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 44 of 2019

BETWEEN : JASON REALTY PTE LIMITED

PLAINTIFF

AND : SAVONA HOLDINGS LIMITED

DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF	:	Mr. A. Nandan [Neel Shivam Lawyers]
DEFENDANT	:	Mr. V Anand [Interalia Consultancy]
RULING BY	:	Acting Master Ms Vandhana Lal
DELIVERED ON	:	**27 April 2022**

INTERLOCUTORY RULING

Application

1. The Defendant seeks to have "*the judgment by default entered against it on 21st March 2019 set aside unconditionally on the grounds of irregularity*". It further seeks leave to file its defence in the proceeding.

2. This application is made pursuant to Order 2 Rule 2 and Order 19 Rule 9 of the High Court Rules and is supported by an affidavit sworn by Peter Savona on 27th August 2019.

File History

3. On 12th February 2019 the Plaintiff via its solicitors caused a writ of summon and statement of claim be issued against the Defendant and one other.

4. On 22nd February 2019 the Defendant filed its acknowledgement of service.

5. As per the affidavit of service filed on 19th February 2019 the other named Defendant was served on 12th February 2019 whilst the First Defendant was served on 13th February 2019 at its registered office at level 8 Dominion House, Thomson Street Suva.

6. On 11th Mach 2019 a notice of discontinuance was filed withdrawing the matter against the other named Defendant.

7. On 15th March 2019 a praecipe for default judgment with a search for acknowledgement of service was filed by the Plaintiff's solicitors.

8. A judgment by default as no defence being filed was sealed on 21st March 2019.

9. On 27th August 2019 the Defendant made the current application for setting aside the judgment.

The Claim

10. The Plaintiff's claim is for a sum of $87,200 being commission to the Plaintiff for introducing the purchaser to the Defendant for its property on Crown Lease 5948.

11. In its statement of claim the Plaintiff pleaded that via email correspondences an arrangement was said to have been made between the Plaintiff and Defendant on the particulars of sale for the said property.

Was the service of the writ and statement of claim proper?

12. Order 65 Rule 3 of the High Court Rules outlines how service of a document is to be effected on a body corporate and it reads:

> *1. Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving it in accordance with rule 2 on the mayor,*

chairman or president of the body, or the town clerk, secretary, treasurer of other similar officer thereof.

2. *Where a writ is served on a body corporate in accordance with Order 10, rule 1(2), that rule shall have effect as if for the reference to the usual or last known address of the defendant there were substituted a reference to the registered or principal office of the body corporate and as if for the reference to the knowledge of the defendant there were substituted a reference to the knowledge of a person mentioned in paragraph (1)*

13. The registered office of the Defendant is said to be at Level 8, Dominion House, Thomson Street, Suva.

14. As per the affidavit of service filed on 19th February 2019 the writ of summon and acknowledgement of service was served at the Defendant's registered office on 13th February 2019.

15. On 22nd February 2019 an acknowledgement of service was filed on behalf of Defendant.

16. Yet the Defendant in its affidavit in support (at paragraph 32) denies having knowledge of the Writ been so served on the Defendant.

17. Accordingly, I find the service to be proper on the Defendant.

With there being no signed contract between the plaintiff and the defendant, does the claim become an unliquidated claim?

18. In **Philips & Co [A Firm] v Bath Housing Cooperative Ltd [2013 2 ALL ER 475** the 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 complete 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 meruit 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 meruit 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 meruit 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."

19. The Plaintiff claims it is entitled to a commission of 5% worked on the sale price of the property.

20. The quantum can be ascertained arithmetically.

21. The issue that there was not a valid contract between the parties, can be raised as defence.

22. Hence, I do not find that the issue of whether there was a valid contract or not between the parties makes the claim an unliquidated claim.

Was the judgment so entered a regular or irregular judgment?

23. Pursuant to **Order 12 Rule 4,** a Defendant has 14 days after service of the Writ (including the day of service) to acknowledge service.

24. **Rule 5** however states:

(1) Except with the leave of the Court, a defendant may not give notice of intention to defend in an action after judgment had been

obtained therein to defend in an action after judgment has been obtained therein.

(2) Except as provided by paragraph (1), nothing in these Rules or any Writ or order thereunder shall be construed as precluding a defendant from acknowledging service in an action after the time limited for so doing, but if a defendant acknowledges service after that time, he or she shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other act later than if he or she had acknowledged service within that time.

25. **Order 18 rule 2** states the time within which a defence ought to be served and it reads:

1) subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the Plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him or her, whichever is the later.

(2) If a summons under Order 14, Rule 1 or under Order 86,Rule 1 is served on a defendant before he or she serves his or her defence, paragraph (1) shall not have effect in relation to him or her unless by the order made on the summons he or she is given leave to defend the action and, in that case, shall have effect as if it required him or her serve his or her defence within14 days after the making of the order or within such other period as may be specified therein.

26. The Defendant had 28 days since 13th February 2019 to file its defence by 12th March 2019.

27. It failed to do so hence a default judgment was sealed on 21st March 2019.

28. Hence for reason afore mentioned I find the judgment so entered to be a regular judgment.

Reason for delay explained?

29. The deponent to the affidavit in support states he was not aware of the writ being served. But fails to inform how the company or he became aware of the action.

30. However as mentioned earlier an acknowledgement of service was filed by the Defendant on 12 February 2019.

31. The deponent states he engaged Ms Ali as his counsel who wrote to Messrs Neel Shivam Lawyers.

32. A default judgment was served on the Defendant on 01st May 2019.

33. The defendant has failed to provide with good reasons why it allowed the default judgment to be entered against it.

Meritorious Defence Outlined?

34. The Defendant proposes it has substantial grounds of defence with a real prospect of success based on following facts:

- *There was no written agreement between the parties for the plaintiff to act on behalf of the defendant to market and arrange the sale of the property;*

- *No terms were agreed upon as to a commission;*

- *The plaintiff did not respond to a request from the defendant to promptly confirm a variation to the terms regarding payment of a commission;*

- *The purchaser of the property approached the defendant directly to negotiate the purchase of the property after first seeking to lease the property through the plaintiff;*

- *Even if the purchaser confirms that it was introduced by the plaintiff, the defendant must agree the terms of representation and commission payable which was not done;*

- *The defendant communicated directly with the purchaser and drafted its own sale and purchase agreement;*

- *The purchaser appointed its own solicitor to manage the purchase of the property;*

- *The plaintiff did not have any involvement in the negotiation of the terms of the sale, the production of documentation or finalization of the sale and transfer to the purchaser.*

Email correspondences and whether they form a valid contract between the parties?

35. Email of 06th April 2018 by Jason Dass to Peter Savona [annexure PS 1 to the Defendant's affidavit in support] informed a client interested in buying, plaintiff's fee will be 5% plus value added tax.

Peter replied on 06th April 2018 but full content of the email is not disclosed.

36. In the email of 17th April 2018 by Peter Savona [annexure PS 7] it's understood the dispute was where the deposit was to be paid since as per clause. 26.2 of the Sale and Purchase Agreement the deposit was to be held in trust by the agent solicitor.

Mr. Savona did not agree to this as he wanted the deposit to go to his bank account.

37. However, Mr. Savona agrees to pay the Plaintiff's commission upon "*the complete execution of the deal*".

38. Whether these email correspondences will qualify as an agreement under section 59 of the Indemnity, Guarantee and Bailment Act, is a matter which ought to be property tried out at trial.

Prejudice to Parties

39. Neither party has said how they will be prejudiced if the judgment is set aside or not set aside.

Findings

40. Hence, I find the judgment so sealed on 21 March 2019 ought to be set aside and the claim be heard on evidence from both parties to determine if there was a valid contract between the parties.

41. For the delay caused, the Plaintiff can be compensated with cost.

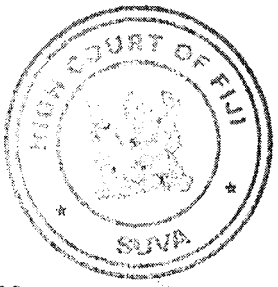
Orders

42. The judgment by default sealed on 21st March 2019 is set aside on following conditions.

43. The Defendant is to file/serve its defence by 4pm on 06 May 2022.

44. The Defendant is to pay the Plaintiff cost summarily assessed at $1,000 and to be paid by 4pm on 06 May 2022.

45. The Plaintiff to file a reply to the defence by 13 May 2022.



.....
Vandhana Lal [Ms]
Acting Master
At Suva.

27 April 2022

TO:

1. **Suva High Court Civil Action No. 44 of 2019;**
2. **Neel Shivam Lawyers**, Solicitors for the Plaintiff;
3. **Interalia Consultancy**, Solicitors for the Defendant.