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SUBODH KUMAR MISHRA

v.

CAR RENTALS (PACIFIC) LTD

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[COURT OF APPEAL—(Speight, V.P., O'Regan J.A., Roper J.A.)]

Date of Hearing: 29 October 1985
Date of Judgment: 8 November 1985

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Practice and Procedure—Judgment entered in Magistrate's Court in default of defence—O.XXXIV Rule 3 validity where claim was not liquidated—setting aside judgment a matter of discretion—meaning of "liquidated demand".

S. Singh for the Appellant
F. Khan for Respondent

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Appeal against a decision of the Supreme Court which had dismissed an appeal against the judgment of a Magistrate in favour of the respondent for the sum of $2,163.48, there having been no defence filed in the action.

On 8 February 1984 the matter was first called in the Magistrate's Court. On that day the appellant was ordered to file and serve a statement of defence, the proceedings being adjourned to 7 March 1984.

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On 7 March 1984 the matter was adjourned to 4 April 1984. The respondent sought and was given judgment in default of defence in the sum mentioned.

On 12 July 1984 the appellant applied to set aside the judgment. On 9 August 1984 the Magistrate concluded the appellant lacked good faith in the matter but being aware there was another action between the parties arising out of the same action set aside the judgment but made the order conditional upon the appellant paying into the court the amount of the claim. and on such payment being effected the case be reported to the Supreme Court (Magistrate's Court Act Cap. 14 S.32) with a recommendation it be transferred there for consolidated with the case already pending there.

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On 27 March 1985 on appeal the learned Supreme Court Judge considered the amount was liquidated. being special damages totalling $2.163.48 for the cost of repair of a motor car and of having it towed away. He found the judgment was not irregular and that the condition for setting aside the judgment was not unreasonable. He dismissed the appeal.

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The Court of Appeal discussed the question where the judgment was regularly or irregularly obtained and the meaning of the phrase 'liquidated demand'. It said the the respondent's action was in tort. the amounts claimed were special damages which in the absence of statutory mandate have to be proved before judgment can be entered. The claim was not one therefore for a liquidated amount.

A It further discussed whether the judgment was irregularly or regularly obtained. If so the first appellant was entitled to have it set aside as of right; but if the latter the Court had (O.XXXIV Rule 3) an unfettered discretion.

Held: Pursuant to Order XXXIV Rule 3 where there had been a failure to comply with an interlocutory order the court in the exercise of discretion may enter a judgment whether the claim be liquidated or unliquidated and without the necessity of
B hearing the evidence even in cases where the claim is in tort.

The judgment was not irregularly obtained and the appellant was not entitled to have it set aside unconditionally and as of right.

The decision to impose the condition was not a wrongful exercise of discretion
C though the same result could have been provided by making an order in the alternative as to the provision of further security.

Appeal allowed only to the extent that the condition made by the Magistrate should read:

"Conditional upon the appellant paying into Court the sum of $2,217.48 or giv-
D ing security for that amount to the satisfaction of the Registrar of the Magistrate's Court at Nausori within 30 days from the date of this judgment.". Appellant to pay $100 costs.

Cases referred to:
Knight v. Abbott (1882) 10 Q.B. 11
E *Workman Clark & Co. Limited v. Lloyd Brazileno* (1908) 1 K.B. 968
Paterson v. Wellington Free Kindergarten (1966) N.Z.L.R. 975
Alexander v. Ajax Insurance Co. (1966) V.R. 436
Anlaby v. Praetorious (1888) 20 Q.B.D. 764
Craig v. Kanssen (1943) K.B. 256
Gardner v. Jay (1885) 29 Ch. D. 50

F O'REGAN, Judge of Appeal.

Judgment of the Court

The respondent brought an action against the appellant in the Magistrate's Court at Nadi whereby it alleged negligence and claimed special damages totalling $2,113.48 for the costs of repairs of a motor car damaged in a collision and of having
G it towed away from the scene.

The matter was first called in the Magistrate's Court on 8th February 1984 by which time a notice of intention to defend had been filed. On that date the appellant was ordered to file and serve a statement of defence within 14 days and the proceedings were adjourned to 7th March 1984 for mention.

When the matter was called on 7th March 1984 it was found that the defence had
H not been filed. The proceedings, however, were, by consent, adjourned to 4th April, 1984 for further mention.

By 4th April, 1984 the statement of defence still not having been filed, the respondent sought judgment in default of defence and judgment was duly entered for $2,163.48 with costs to be taxed if not agreed upon.

On 12th July, 1984—shortly after the respondent had set about levying execution upon this judgment—the appellant filed an application to set aside the judgment and for leave to deliver a statement of defence. The application was supported by an affidavit by a solicitor in the employ of the appellant's solicitors who deposed that he had prepared the statement of defence and a counterclaim on 15th March, 1984 and that "it appeared due to some misunderstanding and/or confusion" on the part of clerk employed by the firm, whom he named, "the document was probably not properly filed". Of course, it was not filed at all. Nothing resembling a satisfactory explanation was proferred.

The application was heared by the learned magistrate on 9th August 1984. He accepted a submission made by counsel for the respondent that the claim was for a liquidated amount and after discussing the course of events and the appellant's part in them, he concluded that the appellant lacked good faith in the matter. He was, however, made aware that there was another action between the appellant's wife and the respondent arising out of the same accident as does the present case, and he thought it well that one court should deal with the two cases at the same time. Accordingly he set aside the judgment but made the order conditional upon the appellant paying into Court within 7 days the amount of respondent's claim and ordered that on such payment in being effected, the case be reported to the Supreme Court pursuant to section 32 of the Magistrate's Court Act (Cap. 14) with a recommendation that the case be transferred there for consolidation with the case pending in that Court.

The appellant appealed to the Supreme Court against such determinations on the grounds that:

1. The magistrate erred in law and in fact in imposing the condition as to payment.
2. Such condition was unreasonable.
3. The default judgment was irregular.
4. The magistrate did not apply correct principles in exercising or considering the exercise of his discretion.

The appeal was heard by Dyke J. on 27th March, 1985. The respondent again advanced the submission that the claim was for a liquidated amount and the judgment regular. The Judge, in essence, upheld that submission. He said:

> "The judgment of the magistrate was not irregular in the circumstances and I cannot say that the condition for setting aside the judgment is unreasonable. The appeal is dismissed."

Although the learned magistrate made no reference to O.XXXIV of the Magistrates' Courts Rules, it seems beyond peradventure that the jurisdiction he exercised is conferred by those parts of that order which relate to enforcement of interlocutory orders, it having been non-compliance with the order to file a statement of defence upon which the plaintiff's application was based.

O.XXXIV, as far as it is relevant, provides:

> "1. .....
> 2. Any interlocutory order may be enforced by any of the methods applicable thereto by which a final order is enforceable.
> 3. Interlocutory orders may also be enforced according to the following provisions:

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> If a plaintiff in a suit makes default or fails in fulfilling any interlocutory order, the Court may.....;
>
> If a defendant in any suit makes such default or failure, the Court may give judgment by default against such defendant, or make such other order as to the Court may seem just.
>
> Provided that any such judgment by default may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit."

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Rule 2 clearly is of no present application. Accordingly, the jurisdiction arose from that part of Rule 3 applicable to a defendant which, in terms, confers a discretion upon the Court both in respect of the giving of a judgment by default or in the making of "such other order.....". And a discretion in like terms is conferred in the exercise of the power to set aside the judgment which is to be found in the

C proviso.

Before turning to consider the question as to whether or not the judgment was regularly or irregularly obtained, we must, in the circumstances of this case, go into the question as to what is meant by such phrases as "liquidated demand" and "liquidated claim".

In *Knight v. Abbott* (1882) 10 Q.B. 11 it was held that:

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> "A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under a contract. Its amount must be ascertained or ascertainable as as mere matter of arithmetic."

And to like effect is a dictum in *Workman Clark & Co. Limited v. Lloyd Brazileno* (1908) 1 K.B. 968 (C.A.):

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> "A claim is unliquidated, where even though specified or named as a definite figure, its ascertainment requires investigation beyond mere calculation."

These definitions and others in like terms have sometimes been criticised as not encompassing all instances of liquidated claims or demands—see, for instance, *Paterson v. Wellington Free Kindergarten* (1966) N.Z.L.R. 975 at p.982 and *Alexander v. Ajax Insurance Co.* (1966) V. R. 436. But we need not stay to consider those matters

F because here the facts fall outside the situations said not to be covered by them. The respondent's action is in tort and the damages he claims are special damages—all matters which, in the absence of consent or a clear statutory or regulatory mandate to the contrary, have to be proved before a judgment can go. We accordingly hold that both courts below were in error in holding the claim to be one for a liquidated amount.

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We now turn to consider the question whether or not the judgment was entered irregularly or regularly. And we preface our observations by saying that in the application of similar rules as to that which is here under consideration, both in England and New Zealand, the cases in which a default judgment may be set aside have been grouped accordingly as the judgment was regularly or irregularly obtained. The distinction is clearly stated by Fry L.J. in *Anlaby v. Praetorious* (1888) 20 Q.B.D. 764 at p. 769 where he said:

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> "There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip

or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief." A

See, to like effect, *Craig v. Kanssen* (1943) K.B. 256 and the cases discussed therein.

Accordingly, if the judgment was obtained irregularly, as is contended, the appellant was entitled to have it set aside *ex debito justitiae*, but, if regularly, the Court was obliged to act within the framework of the empowering provision—in this case—the proviso to O.XXXIV r.3 which confers an unfettered discretion upon the Court. B

The relevant portion of O.XXXIV r.3 is in general terms. It does not place any limitation as to the nature of the cause of action upon which a default judgment may be entered nor does it limit its operation to a claim which is liquidated. In this respect the rule differs from O.VI r.8 which provides: C

"In the case of liquidated demands only, where any defendant neglects to deliver and serve the notice of defence prescribed by rule 8 within the time limited by the said rule, and is not let in to defend in accordance with the provisions of rule 7, then and in such case the plaintiff may enter a final judgment against the defendant."

Clearly in such a case if a judgment were entered in respect of an unliquidated demand it would have been given irregularly and could be set aside *ex debito justitiae*. D

And O.XXXIV r.3 is also to be contrasted with O.XXX r.3 which provides that if the plaintiff appears at the hearing "and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of the summons proceed to hear the case *and give judgment on the evidence adduced by the plaintiff*....." E

The underlining is ours.

So, in the instant case, if the appellant had not appeared at the hearing and a judgment was entered without the hearing of the evidence both as to liability in negligence and of the special damages claimed, such judgment would have been also given irregularly with the consequences previously outlined. F

The differences between these two rules and that under consideration make it, so it seems to use, abundantly plain that express provision has been made whereby failure to comply with interlocutory orders may be visited with the more drastic consequences and we conclude that, in such cases, the Court may, in exercise of its discretion, enter a judgment whether the claim be liquidated or unliquidated and without the necessity of hearing evidence even in cases, such as the present, where the claim is in tort. G

For the foregoing reasons—and notwithstanding our finding the claim to be unliquidated—we reject the submission that the judgment was irregularly obtained. Accordingly the appellant was not entitled to have it set aside unconditionally and as of right.

The second ground of the appeal to this Court is that the order requiring the appellant to pay into Court the amount of the claim was in the circumstances unreasonable and unnecessary. The proviso empowers the imposition of terms and H

A lays down no bases upon which the discretion is to be exercised. Bowen L.J., in *Gardner v. Jay* (1885) 29 Ch.D. 50, at p.58, referring to that situation said:

> "....when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the
> B Act or the Rules did not fetter the discretion of the Judge why should the Court do so?"

The learned magistrate took the view that the appellant had displayed a marked indifference towards the proceedings and expressed doubts as to his bona fides in the matter. But the appellant himself gave no evidence upon which a judgment could be passed upon his good faith. The evidence, as the magistrate himself recor-
C ded, showed that the indifference and casualness as to the proceedings was due to negligence on the part of his solicitors. In all these circumstances we are disposed to think that the inclination to find mala fides was no warranted. We do not overlook that the position of the respondent also had to be considered. It had been put about and inconvenienced and it was not unreasonable that the Court should make an order which would amend that situation and strengthen its position for the future.

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And in all, we do not think that the decision to impose the condition was a wrongful exercise of this discretion but we take the view that the result which was contended could be as well provided for by making an order, in the alternative, as to the provision of further security.

We accordingly vary the condition made by the magistrate to read as follows:

E "....Conditional upon the appellant paying into Court the sum of $2,217.48 or giving security for that amount to the satisfaction of the Registrar of the Magistrate's Court at Nausori within 30 days from the date of this judgment."

And to that extent only the appeal is allowed.

We think that the circumstances of this case are such that the respondent should neither be mulcted in costs nor indeed put out-of-pocket in the matter and we order
F that the appellant pay its costs on this appeal in the sum of $100.00.

Appeal partly allowed.