Although a decision under the CPR it is a good example of the difference between specified and (liquidated) unspecified claim (unliquidated)

A

BIRBARI, LTD. *v.* FREDA BIRBARI AND ANOTHER

[COURT OF APPEAL OF JAMAICA (Graham-Perkins, Robinson and Zacca, JJ.A.), May 12, 14, 1976]

B

Practice—Judgment in default of defence—Debt or liquidated demand—Specially endorsed writ claiming liquidated demand and damages for breach of contract—Final judgment entered in respect of both claims—Judgment irregularly entered—Judgment set aside—Judicature (Civil Procedure Code) Law [J.], Cap. 177, ss. 245, 249, 258.

C

By a specially endorsed writ the respondents (the landlords) sought to recover from the appellant (the lessee) damages for breach of contract arising from the alleged failure by the appellant to observe certain obligations imposed upon him by the lease. The writ particularised the details of expenditure incurred by the respondents in respect of repairs to the premises occasioned by the appellant's failure to observe the terms of the lease. The respondents also claimed a sum of money in respect of telephone services supplied to the D premises during the term of the lease. On the appellant's failure to file a defence to the respondents' claim, the respondents proceeded to enter final judgment in respect of both heads of claim. In the result the appellant by summons sought an order from the Master that the judgment entered in default of defence and the execution issued thereon be set aside on the ground that the judgment had been irregularly entered since the statement of claim disclosed a claim for unliquidated damages only, and that it be at liberty to defend E the action. The Master refused the application on the ground that the judgment entered by the respondents was entered in respect of a claim for a liquidated amount and was, therefore, properly and regularly entered. On appeal, it was argued on behalf of the appellant that not one of the sums claimed in the writ could be said to be a debt or liquidated demand so as to entitle the respondents to enter final judgment in respect thereof since the ascertainment of the precise amount due in respect of each sum claimed F required investigation; in the circumstances the respondents ought to have entered interlocutory judgment. For the respondents it was argued that since each of the sums claimed represented a specific sum due and owing they were fairly to be regarded as liquidated demands and that the judgment had accordingly been regularly entered.

Held: that with respect to those sums claimed by the respondents in connection with repairs to the premises occasioned by the appellant's alleged failure to observe his G obligations under the lease, they clearly were not liquidated sums entitling the respondents to enter final judgment; the claim in respect of telephone services, however, was fairly to be described as a claim for a debt or liquidated demand and in respect of which the respondents would have been entitled to enter final judgment; in the particular circumstances of the case, however, the judgment would be set aside and the appellant given leave to defend the action. H

Appeal allowed.

Cases referred to:

(1) *Knight* v. *Abbott* (1882), 10 Q.B.D. 11; 52 L.J.Q.B. 131; 31 W.R. 505.

(2) *Abbey Panel and Sheet Metal Co., Ltd.* v. *Barson Products*, [1947] 2 All E.R. 809; [1948] 1 K.B. 493; [1948] L.J.R. 493. I

(3) *Re Mosenthal, ex p. Marx* (1910), 54 Sol. Jo. 751.

Appeal against the decision of the Master refusing an application by summons to set aside a final judgment entered in default of defence, and for leave to defend.

Emil George, Q.C., for the appellant.

H. D. Carberry for the respondents.

A **GRAHAM-PERKINS, J.A.,** delivered the judgment of the court: By a specially indorsed writ dated and filed on August 6, 1974, during the long vacation, the respondents made a claim against the appellant in the terms following:

STATEMENT OF CLAIM

1. By a lease dated the 26th day of May, 1971, the Defendant became and was a tenant of the Plaintiffs in respect of premises known as 135 King Street, in the Parish
B of Kingston. The Plaintiffs will refer at the trial to the said lease for its full terms and legal effect.

2. It was a term of the said lease that the Defendants would:

(a) pay all charges for telephone services supplied to the premises during the said term save that any such charges for services supplied partly during partly before or after the terms would be apportioned; and
C
(b) maintain the interior of the premises in good and substantial repair; and

(c) yield up the premises in tenantable repair.

3. In due course the lease duly expired and the Defendant delivered up the said premises to the Plaintiffs but the premises and certain fixtures contained therein were not delivered up in the same condition as they were at the commencement of the said term. Further, the Defendant did not settle all outstanding charges for the telephone
D services supplied to the premises during the term of the said lease.

4. As a result of the matters aforesaid the Plaintiffs have sustained loss and damage.

PARTICULARS

(a) Telephone bill	$401.54
(b) Cost of light fixtures	108.00
E (c) Repair of ceiling and column	40.00
(d) Replacing wooden fixtures and partitions	940.00
(e) Replacing electrical fittings	190.00
(f) Replacing locks	30.00
(g) Repairs to elevator	142.00
F	$1,851.54

AND the Plaintiffs claim:

(a) The said sum of $1,851.54.

(b) Interest on the above sum at the rate of 12 *per centum per annum* from the
G date hereof to judgment or payment."

On August 13, 1974, the appellant, through his attorneys, entered an appearance to the writ. Thereafter nothing was done until October 14, 1974, when, the appellant having by then failed to file his defence, the respondents proceeded to enter final judgment in the sum of $1,851.54.

On April 4, 1975, there came on for hearing before the learned Acting Master of the
H Supreme Court a summons issued at the instance of the appellant's attorneys. By this summons the appellants sought an order that the "judgment entered herein in default of defence on the 14th day of October, 1974 and the execution issued thereon be set aside on the ground that the said judgment was entered irregularly in that it was a final and not an interlocutory judgment, whereas the statement of claim disclosed a claim for unliquidated damages only; and that the defendant be at liberty to defend the action ...". At the
I conclusion of the submissions advanced on behalf of the appellant and the respondents the Master concluded:

"Court finds that the judgment was for a liquidated amount and was properly and regularly entered. Application to set aside judgment refused."

The question posed on this appeal, argued with a refreshing clarity by Mr. Emil George for the appellant and Mr. H. D. Carberry for the respondents, is whether the Master was right in holding that the final judgment entered herein was a judgment "for a liquidated

amount". More precisely, was the respondents' claim, as reflected in the statement of claim, a claim for a debt or liquidated demand? A

Section 245 of Cap. 177 provides:

> "If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a statement of defence, and deliver a copy thereof, the plaintiff may, subject to the provisions of section 258A of this law, at the expiration of such time, enter final judgment for the amount claimed, with costs." B

What then is a debt or liquidated demand within the meaning of s. 245 and, indeed, s. 249? The history of the former section and the authorities relating thereto make it abundantly clear that in order to be entitled to enter final judgment on a defendant's failure to file a defence to his claim on the ground that his claim is for a debt or liquidated demand, a plaintiff must: (i) show that his claim arises under a contract; (ii) state the amount demanded, or so express it that the ascertainment of the amount due is a mere matter of calculation; and (iii) render sufficient particulars of the contract so as to describe its real nature. It is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim, or fails to bring it, within the meaning of the words "debt or liquidated demand". See ENCYCLOPAEDIA OF LAWS OF ENGLAND (2nd edn.), 1908. Be it observed, too, that a plaintiff does not bring his claim within s. 245 of Cap. 177 by the mere device of particularising in his statement of claim, in the form of definite sums of money, what in effect are unliquidated damages: see *Knight* v. *Abbott* (1). C D

In my view there cannot be the least doubt that the respondents' claim was not a claim for a debt or liquidated demand so as to entitle them to enter final judgment in default of defence. So far as items (b) to (g) are concerned these were, very clearly, not sums payable under the contract—the lease—of May 26, 1971. *Ex facie* the material terms of the lease did no more than to impose certain named obligations on the appellant. Indeed, and again *ex facie*, nothing is said—and it is important to observe, I think, that the material time at which the question as to the nature of the respondents' claim is to be determined is the time when they purported to enter final judgment—as to the consequences that were to ensue upon the appellant's failure to observe and perform the obligations contained in the lease. The respondents would, of course, have their undoubted common law right to seek to recover from the appellant damages for breach of contract upon such failure. But a right to recover damages for breach of contract cannot, in the circumstances of this case, be equated with a right to recover a debt or liquidated demand. It is nothing to the point that the respondents were able to quantify the damages that flowed from the alleged breaches by the appellant of its obligations under the lease. See, e.g. *Abbey Panel and Sheet Metal Co., Ltd.* v. *Barson Products* (2). So far as the alleged breaches by the appellant consisted of (i) a failure to "maintain the interior of the premises in good and substantial manner". and (ii) a failure to "yield up the premises in tenantable repair" the damages would, no doubt, be assessed by reference to such monies as were *necessarily* expended by the respondents in restoring the premises. But the ascertainment of the amount to which the respondents would be entitled would, clearly, depend upon an examination of the extent to which the appellant had failed in his obligation, and of the extent to which they could justify the expenditure they chose to incur. They would not, for example, be entitled to $190 for "replacing electrical fittings" (item (e) *supra*) merely because they had spent that amount. They would be required to show that loss of, or damage to, electrical fittings (whatever those words embrace) followed from a breach of some term of the lease and that in the result they had reasonably incurred an expenditure of $190 in connection therewith. E F G H I

With respect to item (a) it would seem that different considerations arise. It is clear from the terms of para. 2 of the statement of claim that the appellant was required by a term in the lease to "pay all charges for telephone services supplied to the premises (*inter alia*) *during* the said term ..." Paragraph 3 alleges that the appellant "did not settle all outstanding charges for telephone services supplied to the premises *during* the term of the said lease". There is nothing in the statement of claim to suggest that the amount claimed

A in item (a) is referable to services supplied *partly during and partly before or after the term*. It follows, therefore, that the amount claimed under item (a) may fairly be described as "a specific sum of money due and payable under or by virtue of a contract" and, therefore, as a debt or liquidated demand. Mr. Carberry argued that if the court took the view that item (a) constituted a debt or liquidated demand it could enter final judgment in respect of the sum of $401.54 only and set aside that part of the judgment relating to the B balance of the claim. He relied on *Re Mosenthal, ex p. Marx* (3) as authority for that course. In *Re Mosenthal* (3), a judgment in the sum of £746 was entered against D. in default of appearance. D. then moved under Ord. 27, r. 15 to set aside the judgment. That rule, the terms of which are identical to s. 258 of Cap. 177, provided that "Any judgment by default ... may be set aside by the court or a Judge upon such terms as to costs or otherwise as such court or Judge may think fit". Master Chitty ordered that execution C should be stayed upon the judgment if D. paid £150 into court within seven days, but that if that sum were not paid the judgment should stand good for £150 and that D. should have leave to defend as to the balance. D. failed to pay the £150 and the petitioning creditor thereupon served a bankruptcy notice upon D., requiring him to pay that sum. D. failed to comply, a petition was presented against him, and a receiving order was made thereon against which D. appealed. Counsel for the appellant contended, *inter alia*, that D the Master had no power to alter a judgment for £746 into a judgment for £150. COZENS-HARDY, M. R., was of the opinion that the order directing the judgment to stand good for £150 was one which the Master had power to make under Ord. 27, r. 15, on the ground that the words of that rule meant that the judgment could be set aside either wholly or in part. For myself, I find it not a little difficult to detect the basis for the conclusion of the learned Master of the Rolls. He assigned no reason, nor did he cite any E authority therefor. It may be that a discretion to set aside a judgment embraces a discretion to set aside that judgment in part only. I am not, however, persuaded that this is what the rule contemplates. I would have thought that, in the ordinary use of language, the rule meant precisely what it said, that is, "any judgment by default may be set aside", and not that any judgment by default may be set aside *either wholly or in part*. In any event I do not regard *Re Mosenthal* (3), whether COZENS-HARDY, M. R., was right or not, F as authority for the course contended for by Mr. Carberry since, *inter alia*, that case was concerned with a judgment which had been regularly entered.

In my view this case falls properly within the terms of s. 249. That section provides, *inter alia:*

> "If the plaintiff's claim is, as against any defendant—
>
> (a) for unliquidated damages ...; and also
>
> G (b) for a debt or liquidated demand, and no other claim is made as against that defendant, and that defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter against that defendant, as respects the claim ... for damages ..., such interlocutory judgment as is provided for by section 247 ... of this Law, and subject to the provisions of section 245 of this Law, such final judgment (with costs) in respect of the claim for the debt or liquidated demand H as is provided for by the said section 245, and proceed with the action against the other defendants, if any."

The respondents were undoubtedly entitled to enter, against the appellant, final judgment in respect of the claim for $401.54 (item (a)), and interlocutory judgment in respect of their claims at (b) to (g). Instead of so doing, however, they chose to enter final judgment, I quite irregularly, as to the far greater part of their claim, a course embarked upon without the least justification since that final judgment went beyond the scope of s. 249 (b) of Cap. 177. When the appellant sought to have this error corrected the Master, very unhappily, refused redress.

In this appeal the appellant seeks an order that "the final judgment entered herein in default of defence on the 14th day of October, 1974, and the execution issued thereon be set aside, and that the defendant be at liberty to defend the action". In the circumstances of this case, and more particularly having regard to the several matters alleged in the

affidavit sworn to by Mr. Albert Goffe on March 20, 1975, and filed in support of the summons to set aside the final judgment entered herein, I have not the least hesitation in holding that the proper order for this court to make is that the final judgment entered by the respondents and the execution issued thereon be set aside and that the appellant be at liberty to defend the action. I would order, further, that the appellant file in its defence within fourteen days from the date hereof, and that the appellant have the costs of this appeal to be agreed or taxed, as also the costs of the hearing before the Master on April 16, 1975. I would further order that the respondents have the costs occasioned by the application for extension of time herein.

ROBINSON, J.A.: I agree.

ZACCA, J.A.: I agree.

Appeal allowed.

LESLIE L. DIGGS-WHITE *v.* GEORGE R. DAWKINS

[COURT OF APPEAL OF JAMAICA (Graham-Perkins, Robinson and Zacca, JJ.A.), May 12, 26, 1976]

Attorney-at-Law—Discipline—Attorney undertaking to file divorce petition and to prosecute case to decree absolute—Attorney showing lack of skill in filing of petition—Specific allegations by client of professional misconduct by attorney—Hearing by Disciplinary Committee—Committee finding that attorney guilty of "gross neglect or negligence"—No allegation of negligence or incompetence by client—Committee finding that negligence amounted to professional misconduct—Whether open to Committee to find gross neglect or negligence—Meaning of professional misconduct—Legal Profession Act 1971 *[J.], ss.* 12 (1), (7), 15 (1), 16.

Section 12 (1) of the Legal Profession Act 1971 [J.] provides, *inter alia*:

"Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person ..."

The appellant took instructions from a client, the complainant, to file a petition for divorce on behalf of his daughter and prosecute the matter to decreee absolute or dismissal. In due course the appellant filed a petition which, in two respects, was defective. Thereafter he made an unsuccessful attempt by summons to have the petition amended. He did nothing further. He had charged a fee of $800 to conduct the case to completion. Being dissatisfied with the appellant's handling of the petition the client filed a complaint against the attorney requiring him to answer specific allegations of misconduct before the Disciplinary Committee of the General Legal Council. He asserted, *inter alia*, that the appellant had charged a fee of $350 which he had paid in full and that the appellant had deceived him by giving him two "false dates for trial when in fact no case had been set down for trial". He made no allegation as to negligence. The Committee found that the appellant had charged a fee of $800 and that he had been guilty of "gross neglect or negligence amounting to professional misconduct". It made no findings in relation to the other matters about which the client complained. The Committee ordered that the appellant be suspended from practice for three months and that he refund the $350 paid to him by the client. On appeal, it was argued, *inter alia*, that even if the Committee were justified in concluding that the appellant had been guilty of gross neglect or negligence this did not amount to professional misconduct.

Held: (i) that it was not open to the Committee to find that the appellant had been