J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO.16 of 1975.

BEFORE: The Hon. Mr. Justice Graham-Perkins, Presiding
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

BETWEEN B I R B A R I L I M I T E D - DEFENDANT / APPELLANT

A N D F R E D A B I R B A R I AND L O R I S A N D E R S O N PLAINTIFFS/ RESPONDENTS

Mr. Emil George, Q.C., for the Appellants.
Mr. H.D. Carberry for the Respondents.

M A Y 7, 12, 1 9 7 6

GRAHAM-PERKINS, J.A.,

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 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 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

(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 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

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|---|---|
| (a) Telephone bill | $ 401.54 |
| (b) Cost of light fixtures | 108.00 |
| (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 |
| | $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 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 Supreme Court a summons issued at the instance of the appellant's attorneys. By this summons the appellant 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...

be at liberty to defend the action....". At the 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.

Section 245 of Cap. 177 provides:

> " If the plaintiffs' 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. "

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...

of Laws of England 1908, 2nd Edn. 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, 10 Q.B.D.11.

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 right 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 (1947) 2 All E.R. 809. 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...

justify the expenditure they chose to incur. They would not, for example, be entitled to $190.00 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 word embrace) followed from a breach of some term of the lease and that in the result they had reasonably incurred an expenditure of $190.00 in connection therewith.

With respect to item (a) it would seem that different considerations arise. It is clear from the terms of paragraph 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 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 balance of the claim. He relied on Re Mosenthal, Ex parte Marx, (1909-10)54 Sol.Jo.751 as authority for that course. In Re Mosenthal a judgment in the sum of 746 pounds was entered against D. in default of appearance. D. then moved under O.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 should be stayed upon the judgment if D. paid 150 pounds into Court within seven days, but that if that sum were not paid the judgment should stand good for 150 pounds and that D. should have leave to defend as to the balance. D. failed to pay the 150 pounds and the petitioning creditor thereupon served..

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 the Master had no power to alter a judgment for 746 pounds into a judgment for 150 pounds. Cozens-Hardy, M.R., was of the opinion that the order directing the judgment to stand good for 150 pounds was one which the Master had power to make under 0.27 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 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, whether Cozens-Hardy, M.R., was right or not, 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 plaintiffs' claim is, as against any defendant -
>
> (a) for unliquidated damages ...; and also
>
> (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....

" or liquidated demand 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) ) an interlocutory judgment in respect of their claims at (b) to (g). Instead of so doing, however, they chose to enter final judgment, 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 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 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.

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