

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 27/85

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN	-	LONG YONG (PTE) LIMITED	-	PLAINTIFF/ APPELLANT
AND	-	FORBES MANUFACTURING & MARKETING LIMITED	-	DEFENDANT/ RESPONDENT

Dennis Morrison for Appellant

Dennis Goffe for Respondent

13th February & 6th March, 1986

ROWE, P.:

Section 70 of the Civil Procedure Code sets out the procedure to be followed by a plaintiff who desires to obtain judgment against one or more defendants in a matter in which the claim is for a liquidated demand and the defendant or defendants, has or have not entered appearance. According to that procedure the plaintiff may enter final judgment for any sum not exceeding the sum endorsed on the writ, "together with interest at the rate specified (if any) or (if no rate be specified) at the rate of six per centum per annum, to the date of the judgment and costs".

Applying that apparently clear statement of the statute, the attorneys for the plaintiff/appellant herein, on October 4, 1984 entered a judgment against the defendant/respondent for the

sum of J\$65,428.76 with interest thereon at the rate of 6% per annum from the 13th day of June, 1984 and until payment of the judgment. In the writ the sum claimed was the Jamaican equivalent of U.S. \$16,357.19 and the conversion rate was U.S.\$1.00 to J\$4.00. No complaint could be made as to the correctness of the arithmetic in the conversion process. However, the judgment entered on October 4, 1984 was challenged on the basis that it included a sum for interest and there was no claim for interest in the writ, neither did the agreement under which the debt was said to arise make any stipulation for the payment of interest. On May 2, 1985 the Master was asked to set aside the final judgment entered on October 4, 1984 and he did so on the ground that the judgment was bad in law in that it was entered for too large a sum in that it included interest. The Master ordered that the defendant/appellant be at liberty to file its defence and that the costs thrown away should be the defendant's in any event.

An appeal was taken against the Master's order on the narrow ground that the inclusion of the award of interest was properly made in the judgment and consequently, costs should follow the event, which would mean that upon the grant of leave to the defendant to file defence, the costs thrown away should be the plaintiff's in any event.

Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1955 enables a Court to order interest at its discretion in a large number of cases. It has been held in England that where it is intended to rely on a Statutory provision, similar to section 3 above, a claim for interest need not be pleaded in the writ - Riches v. Westminster Bank Ltd. [1943] 2 All E.R. 725. And it is clear that when section 3 above speaks of "proceedings tried" that term is wide enough to include the entry of final judgment in default of appearance or pleadings - Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd. [1978] 3 All E.R. 399; Alex Lawrie Factors Ltd. v. Modern Injection Moulds Ltd. [1981] 3 All E.R. 658.

Mr. Goffe supported the decision of the Master on the ground that interest is not necessarily liquidated damages. If there is an agreement between parties for a specific rate of interest from a particular period in time, that is a separate and distinct question from a circumstance where a court can be asked to exercise its discretion to grant interest on the whole or part of the sum claimed, at a rate to be fixed by the court having regard to all the circumstances of the case and for a period to be similarly fixed by the court. In Faithfull v. Woodley [1890] 43 Ch. D. 287 North J. said:

"I am not aware of any case in which relief not asked by the statement of claim has been given against a defendant who did not appear at the trial of the action."

In my view the contentions of the defendant/respondent are sustainable on two grounds. Firstly, a defendant would not know how much to pay to satisfy a claim for a liquidated demand which did not specifically claim interest, if he was liable to pay interest at an unspecified rate, hidden within the breast of the plaintiff. Secondly, interest under the Law Reform (Miscellaneous Provisions) Act is in the nature of unliquidated damages and can only be determined through the intervention of a judicial officer.

I adopt the passage from the 4th Edition of Halsbury's Laws Vol. 37 at para. 397:

"Meaning of 'Liquidated demand'.
A liquidated demand is a debt or other specific sum due and payable by the defendant to the plaintiff. It must be ascertained or capable of being ascertained as a mere matter of arithmetic. It does not extend to unliquidated damages, whether in contract or tort, and such a claim does not become liquidated merely because it is expressed as a definite or specific figure. On the other hand liquidated damages stipulated as

"a genuine pre-estimate of the damages which would probably arise in respect of a breach of contract constitute a liquidated demand. So does a claim based on a quantum meruit, such as reasonable remuneration for services rendered or a claim for bank charges.

"A claim does not cease to be a liquidated demand merely because there is added to it a claim for interest, since interest is, juridically speaking, merely an addition or accretion or ancillary to the principal sum claimed. If it is claimed as being payable or recoverable under some contract, express or implied, or by statute, default judgment may be entered for the amount of the interest claimed or for interest to be assessed. A claim for interest under the Law Reform (Miscellaneous Provisions) Act 1934 need not be pleaded, and in the case of a claim for a debt or liquidated demand the plaintiff may enter final judgment for the principal sum claimed and interlocutory judgment for interest under the Act to be assessed."

Consequently, I would dismiss the appeal and hold that in the instant case, it was not appropriate to include in the final judgment entered for the plaintiff/appellant an amount for interest at the rate of 6% per annum from June 13, 1984. The defendant/respondent will have his costs of the appeal to be agreed or taxed.

CAREY, J.A.:

This appeal raises a question of procedure, viz., whether it is permissible to enter judgment in default of appearance, not only for the liquidated sum endorsed on the writ but for interest as well when the latter item is not specifically pleaded. In the present appeal the plaintiff did precisely this. The judgment was entered in the following form:

"The Defendant not having appeared to the Writ of Summons herein and the Affidavit of Service within the jurisdiction of non-appearance and in proof of debt having been filed IT IS THIS DAY ADJUDGED that the Plaintiff recovers against the Defendant the sum of J\$65,428.76 with interest thereon at the rate of 6% per annum from the 13th day of June, 1984 until payment or judgment and costs to be taxed".

The Writ was thus endorsed:

"STATEMENT OF CLAIM

The plaintiff's claim is against the Defendant to recover the Jamaican equivalent of the sum of U.S.\$16,357.19 being the balance purchase price for goods sold and delivered to the defendant by the plaintiff at the defendant's request.

PARTICULARS

June 10, 1983 - To 24 long tons Sarawak black pepper	
shipped per s.s. 'Cardigan Bay' to	
Kingston as per invoice No. FMM 1/82	U.S.\$43,920.00
Less amount received in part payment	
12/10/83	<u>U.S.\$27,562.81</u>
To balance due	U.S.\$16,357.19

And the plaintiff claims the sum of J.\$65,428.76, being the Jamaican equivalent of U.S.\$16,357.19 @ U.S. \$1.00 = J.\$4.00 calculated as at the date hereof".

The appeal comes before us in this way. After judgment in default of appearance had been entered by the plaintiff, the defendant applied to the Master to set aside the default judgment and give leave to file defence and counter claim. In their Summons, the ground for this application was stated thus:

"....., that the judgment is bad because it was entered for too large a sum, in that it wrongly included interest,"

In the event, the learned Master granted the order in terms and awarded costs to the defendant. The appellant does not seek to have the Master's order set aside in its entirety but rather to have that part of the order regarding costs varied on the footing that the ground relied on as appears in the Summons and order, is not supportable.

It was submitted on behalf of the appellant that in order to enter judgment on a claim for a liquidated sum in default of appearance by the defendant, there was no need to claim interest because the power given to the Court pursuant to Sec. 3 of the Law Reform (Miscellaneous Provisions) Act does not depend on any claim therefor. He maintained that Section 70 of the Judicature (Civil Procedure Code) ^{Law} /entitles a plaintiff to enter judgment with interest at the rate of 6%. The plaintiff is entitled to interest although there has been no trial properly so called. Trial in the context of Section 3 Law Reform (Miscellaneous Provisions) Act meant no more, than 'determined'.

Mr. Goffe, for his part, maintained that a claim for interest had to be made to allow judgment in that regard to be entered. Section 70 of the Civil Procedure Code ^{Law} /which allows judgment to be entered in respect of the liquidated sum and interest, assumes that it has been claimed. He relied on Rodway v. Lucas [1855] 10 Ex. 667.

I can say at once that in my view, the arguments of counsel for the appellant in which he adverted to Riches v. Westminster Bank, Ltd. [1943] 2 All E.R. 725; Alex Lawrie Factors Ltd. v. Modern Injection Moulds Ltd. [1981] 3 All E.R. 658 and a Practice Direction of the Queens Bench Division reported [1982] 3 All E.R. 1151, are not well founded.

Now a plaintiff is entitled to enter final judgment in default of appearance by a defendant, to a writ claiming a liquidated sum together with interest pursuant to the provisions of Section 70 of

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the Civil Procedure Code/which enacts as follows:

"70. Where the Writ of summons is indorsed with a claim for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants (if more than one) fail to appear thereto, the plaintiff may, on an affidavit of service of the writ, and of such non-appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied, enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of six per centum per annum, to the date of the judgment and costs.

Such affidavit in proof of debt shall in all cases be filed before entry of judgment, even though the defendant admits the debts, or consents to such judgment".

These provisions are the ipsissima verba of the old R.S.C. Order 13 R3 in England. All the White Books which include a gloss on this particular provision, make it plain that the judgment cannot include interest unless it is claimed as being due under statute or under a contract. In default of such an averment, the judgment will exclude any interest until a judge after a trial awards the plaintiff interest. The authority cited is Rodway v. Lucas (supra). There the plaintiff on a specially endorsed writ claimed varying sums in respect of two (2) promissory notes and an I.O.U. together with interest thereon and in default of appearance signed judgment. It was held that the judgment was regular. That case was based on the Common Law Procedure Act, 1852 Section 27 of which (so far as is material) is in the following form:

"In case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a Judge's order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the Schedule (A) to this Act, annexed, marked No. 5, (on which judgment no

"proceeding in error shall lie,) for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs,

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Section 70 of the Civil Procedure Code/(Order 13 R3) seems to be of the same pedigree as Section 27 Common Law Procedure Act 1852.

In the course of the arguments at the Bar in Rodway v. Lucas, Martin B., pointed out that the plaintiff is entitled to sign final judgment not for interest really due, but for interest claimed on the writ. I think Mr. Goffe was right when he pointed out in the course of his submissions that a defendant was entitled to know what it was that the plaintiff sought, so that he could govern his response to the claim thereby. It is of note that in Alex Lawrie Factors Ltd. v. Modern Injection Moulds Ltd. (supra) where the question was whether a plaintiff was entitled to an award of interest under Section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 when they signed final judgment in default of appearance, the plaintiff's action claiming a liquidated sum for goods sold and delivered also claimed specifically, interest under that Act.

I must now say something about our Section 3 of the Law Reform (Miscellaneous Provisions) Act. It is, I think, plain that an award of interest under that Act does not depend on a claim therefor in the writ. It is well known that no one claims interest under the Act in a writ when the plaintiff seeks, for example, damages for negligence in a motor car accident. The provisions are stated thus:

"3. In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment".

Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd. [1978]

3 All E.R. 399 is authority for the proposition that the word 'tried' in the equivalent English provision means determined and accordingly, proceedings under R.S.C. Order 14 concluded by summary judgment under that order are proceedings 'tried' in a court of record, and the court is not precluded from awarding interest on the judgment. In Riches v. Westminster Bank Ltd. [1943] 2 All E.R. 725 it was held that the section, i.e., Section 3 of the Law Reform (Miscellaneous Provisions) Act does not require a claim for interest to be pleaded, or that the statement of claim must say that the plaintiff, if successful, will ask the judge to exercise his discretion. A Practice Direction [1982] 3 All E.R. 1151, however, requires that such interest under the Act must be claimed expressly in the prayer of the statement of claim. So far as we are concerned in this jurisdiction, Riches v. Westminster Bank Ltd. (supra) is of persuasive authority and consequently, I would incline to the view that in point of law, a claim for an award of interest under the Law Reform (Miscellaneous Provisions) Act need not be pleaded. Nevertheless, where a claim for liquidated damages is being made, and it is intended to claim interest under that Act, it is desirable that such a claim should be included in the prayer.

In so far as the award of interest under Section 70 of the Law Judicature (Civil Procedure Code) is concerned however, it is necessary to claim it expressly in the writ. This view is, therefore, supported both on principle and by authority.

Neither the cases of Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd. (supra) nor Alex Lawrie Factors Ltd. v. Modern Injection Moulds Ltd. (supra) were concerned with interest allowed under Order 13 but with the question whether interest under the Law Reform (Miscellaneous Provisions) Act 1934 is awardable under procedures for summary judgment seeing that there has been no trial.

They are, therefore, quite unhelpful in deciding the question raised in this appeal where the plaintiff in the present proceedings sought to sign final judgment in respect of a liquidated sum together with interest as allowed by the section. The profession should be advised that where it is sought to enter final judgment under the Order 13 procedure, i.e., Section 70 of the Civil Procedure Code Law, then the award of interest may only be entered where it has been expressly pleaded in the writ.

The result of all this, is, that I, for my part, would dismiss the appeal and affirm the order of the learned Master. The respondent is of course to have his costs in this Court.

ROSS, J.A.:

I agree.