EDITORIAL NOTE: NO SUPPRESSION APPLIED

IN THE DISTRICT COURT
AT AUCKLAND

CIV 2014-004-000928
[2016] NZDC 3562

BETWEEN	DIANNE FAYE TAYLOR First Plaintiff
AND	THERMOTEX LIMITED Second Plaintiff
AND	HOT MARKETING LIMITED Third Plaintiff
AND	ADRIAN BARR First Defendant
AND	HOT SOURCE AUSTRALIA (PTY) LIMITED Second Defendant

Hearing: 27 January 2016

Appearances: Mr R W Ackroyd for Applicants/Defendants
Mr M G Beresford for Respondents/Plaintiffs

Judgment: 7 March 2016

DECISION OF JUDGE G M HARRISON

Background

[1] The first defendant (Mr Barr) has been involved with Thermotex products, which are a range of infrared heating system products for both human and pet use, since 2003. The products have therapeutic benefits and provide deep penetrating warmth for temporary relief of acute and chronic pain.

[2] The owner of the rights to Thermotex products is Thermotex Therapy Systems Limited, a company incorporated in Canada. Mr Barr commenced a relationship with that company in 2003 but, when he reached the stage of importing product into Australia for sale, he discovered that the products did not meet

Australian electrical standards and so, ultimately, he located a factory in China that could produce the product to meet those standards.

[3] The manufactured product was ultimately shipped to Australia and steady sales were achieved.

[4] Subsequently, in late 2010 when Mr Barr wished to order further product from China, he encountered difficulty in doing so because he had not ordered product for more than a year and the assembly line had been partly disestablished. Before the Chinese manufacturer would rebuild it, it insisted upon a bond being paid beforehand.

[5] At about that time Mr Barr met the first plaintiff (Ms Taylor) who had a background in sales and marketing. She was impressed with the quality of the product and the potential for sales. In around January 2011 the parties agreed to enter into a joint venture and that they would contract through separate companies, namely Thermotex Limited on behalf of Ms Taylor and Hot Source Australia (Pty) Limited on behalf of Mr Barr.

[6] The plaintiffs made various payments to the defendants and it was agreed that those funds would be applied towards the payment of the bond and the first stock order from China.

[7] Unfortunately the parties could not agree on how the joint venture should operate and it ceased early in 2012 with the parties acknowledging that they could no longer work together.

[8] The plaintiffs issued proceedings in June 2014 in which Ms Taylor sought recovery of the funds she had paid towards the joint venture, alleging negligent misstatement, contractual misrepresentation and breach of s 9 of the Fair Trading Act 1986.

[9] After the proceedings were served upon Mr Barr, his lawyer Anthony Burke of Burke and Associates Lawyers Pty Limited of Armadale in Victoria, Australia, wrote to Ms Taylor's solicitors on 28 October 2014 stating in particular:

> Our clients don't propose to go to the trouble and expense of defending the claims made against them.

[10] He then went on, however, to respond at length to the various allegations made in the statement of claim, possibly with a view to convincing the plaintiffs not to proceed.

[11] No defence was filed in respect of the claim which had been commenced pursuant to the District Court Rules 2009 by the then claims procedure in force. Those rules have now been superseded by the District Court Rules 2014.

[12] Where no defence was filed, a plaintiff was entitled to seek judgment by default by completing Form 6A, which confirmed service on the defendant and the amount claimed by the plaintiff including cost disbursements and, where appropriate, interest. The plaintiffs completed and filed such a form and, on 30 October 2014, a deputy registrar of this Court entered judgment by default against the defendants in the sum of $174,764.52.

[13] Having stated through his solicitor that he did not intend defending the claim Mr Barr now applies to set aside the judgment, which has since been registered in Australia and is currently stayed pending this decision on Mr Barr's application to set aside judgment.

Application to set aside judgment

[14] I have treated the application as being made pursuant to the 2009 rules. R 12.34 of the 2009 Rules provides:

> Any judgment obtained by default may be set aside or varied by the Court on any terms it thinks fit, if it appears to the Court that there has been, or may have been a miscarriage of justice.

[15] I note that the 2014 Rules are to the same effect. See R15:10

[16] While the application to set aside judgment does not specify the rule under which it is brought, Mr Ackroyd's submissions refer to the 2009 Rules, and as judgment was entered pursuant to those rules I intend to determine the application according to those rules.

[17] Judgment by default may be obtained in respect of a liquidated demand simply by the deputy registrar entering judgment on receipt of an appropriately completed Form 6A. If, however, the money in dispute is an unliquidated demand, r 12.28 provides:

> If the relief claimed by the plaintiff is payment of an unliquidated demand in money and the defendant does not within the time allowed serve a response or information capsule or file a statement of defence, the proceeding must be tried for the purpose of assessing damages.

[18] When the matter was called before me on 27 January I indicated to counsel my preliminary view that the amount claimed in the statement of claim was not a liquidated demand and that judgment by default should not have been entered, but that the application should have proceeded to formal proof. I invited each party to file submissions on that issue, which have now been received.

Setting aside a default judgment

[19] "The distinction between a judgment irregularly obtained and a judgment regularly obtained is important because different legal consequences will follow depending upon which category the case falls into. The Court's power to set aside a judgment irregularly obtained is not based on the rule but on the common law. Consequently, the Court is under an obligation to set aside an irregular judgment, and it may not vary the judgment or impose terms in setting it aside under the rule." Lexis Nexis "District Court Practice (Civil)" DCR 12.34.03.

Conversely, the Court has a discretion whether or not to set aside a judgment regularly obtained.

[20] In *O'Shannessy v Dasun Hair Designers Limited* [1980] 2 NZLR 652, 654 Greig J said:

> The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled ex debito justitiae to a setting aside. It is to be noted further that it is an irregularity in obtaining the judgment rather than the irregularity in the judgment itself.

[21] Thus, the position is clear, if the judgment was irregularly obtained then ex debito justitiae it must be set aside.

Was the judgment obtained, irregular?

[22] The plaintiffs' various causes of action seek damages, whether pursuant to the Fair Trading Act, in tort or contract. Assessments of damages are never precise and, as one example only, part of the plaintiffs' payment was to be applied in respect of the bond demanded by the Chinese manufacturer. The issue arises immediately as to whether all or any part of that bond is repayable to the plaintiffs or whether, in terms of the arrangement then existing between the parties, the payment in respect of the bond is irrecoverable. Further similar considerations will arise in respect of the causes of action pursuant to the Fair Trading Act, or the alleged misstatements in tort and contract. The point is, there is no certainty of outcome.

[23] There is no definition of the term "liquidated demand" in the rules. However, in *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 975, 982 McCarthy J referred to a definition found in 8 Encyclopaedia of the Laws of England (2nd Edn 1908) 338 as follows:

> In order to come within the definition "liquidated demand" a claim on a contract must (a) state the amount demanded, or be so expressed that the ascertainment of the amount is a mere matter of calculation; and (b) must give sufficient particulars of the contract to disclose its 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 definition.

Examples of a liquidated demand are: simple debts such as claims for sale and delivery of goods; claims under a guarantee; or claims by a mortgagee where the amounts are certain.

[24] At 12.24.08 of Lexis Nexis "District Court Practice (Civil)" the following statement is made:

> If there is a real dispute about the quantum claimed, it is not a claim for a liquidated demand, but one for damages.

And further:

> The test is not whether the sum is specific, but whether or not evidence is required to prove the debt is owed at all. Thus where there is an allegation of poor workmanship then simply putting a figure on the consequences of that alleged breach of contract does not convert the claim into one for liquidated damages.

[25] It is clear, therefore, that the amount claimed in this matter is not a liquidated demand. Ms Taylor, through her counsel, acknowledges that the claim should have been the subject of a formal proof hearing in October 2014 when the judgment was entered.

[26] With that frank and proper acknowledgement it is clear that ex debito justitiae the defendants are entitled to have the judgment set aside as being irregular in that it was entered by default when a formal proof hearing was required.

[27] Mr Beresford for the plaintiffs relies upon the form used to apply for judgment by default as justifying that course. But that cannot be correct. The rules dictate what course or procedure must be followed and then the appropriate form must be used.

[28] I note that s 4 of Form 6A contains the following:

> If the Court agrees with the amounts you are claiming, the court registrar or deputy registrar will sign and date the judgment and seal it.

This at least gives some indication to the party applying for a default judgment that the Court may not accept the amounts claimed.

[29] Mr Beresford also claims that there is a residual discretion not to set aside a judgment that has been irregularly obtained, but I do not accept that submission

where the authorities are clear that a judgment irregularly obtained must be set aside and the Court has no discretion to do otherwise.

[30] Lastly, Mr Beresford points to the merits of the defendant's position. While I indicated at the hearing on 27 January that I had little sympathy for the defendant, particularly in view of the letter of his solicitor, Mr Burke, that I have referred to, that cannot alter the fundamental point that judgment by default, as entered in this case, was obtained irregularly and must be set aside.

Conclusion

[31] The judgment by default entered against the defendants on 30 October 2014 is set aside.

[32] As far as costs are concerned I decline to award costs in favour of the defendants. The issue on which they have succeeded was not raised by them in their application to set aside the judgment by default, but by me at the hearing on 27 January 2016. There is also the possibility that the deputy registrar may have refused to enter judgment by default had the issue in this case been properly clarified. Furthermore, the invitation of the defendants' solicitor to enter judgment against them and his intimation that there would be no defence to the claim, contributed significantly to the procedure that was followed.

[33] The defendants are directed, therefore, to file a statement of defence to the plaintiffs' amended notice of claim of 2 September 2014 within 30 working days of the date of this decision. Thereafter the proceeding is to be referred to a case management conference.

G M Harrison
District Court Judge