

**BETWEEN: MR. PATTERSON ARNHAMBATH**  
Claimant

**AND: MARBLEDUST LIMITED**  
Defendant

**Coram:** Justice D. V. Fatiaki

**Counsel:** Mr. D. Yawha for the Claimant/Respondent  
Mr. N. Morrison for the Defendant/Applicant

**Date of Ruling:** 19 September 2013

## **RULING**

1. In this application the defendant company seeks to set aside a default judgment entered against it on **21 June 2010** in the sum of **VT3,612,600**. The default judgment amount is broken down as follows:

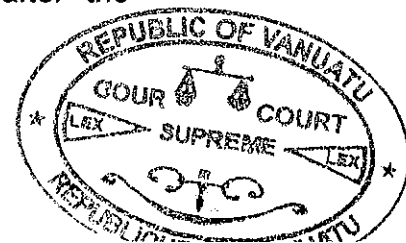
"a. Damages for pain and suffering at	VT3,552,600;
b. Filing and Service fees:	VT20,000;
c. Total Legal Costs:	VT40,000."

2. On the face of it, the default judgment purports to be for a liquidated fixed sum. I say purports because the actual claim in the case seeks inter alia "... general damages for pain and suffering ..." and "... for economic loss for 3 years ...". All heads of claim are quantified in the claim in various amounts.
3. Be that as it may, the relevant rule is **Rule 9.1** of the **Civil Procedure Rules** which provides:

### **"Default by defendant**

#### **9.1 If a defendant:**

- (a) does not file and serve a response or a defence within 14 days after service of the claim; or
- (b) files a response within that time but does not file and serve a defence within 28 days after the service of the claim;



the claimant may file a sworn statement (a "proof of service") that the claim and response form was served on the defendant as required by Part 5.

**Default - claim for fixed amount**

**9.2** (1) This rule applies if the claim was for a fixed amount.

(2) After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for the amount of the claim together with interest and costs. The request must be in Form 12.

(3) In the Magistrates Court, the request may be made orally.

(4) The court may give judgment for the claimant for:

- (a) the amount claimed by the claimant; and
- (b) interest from the date of filing the claim at a rate fixed by the court; and
- (c) costs in accordance with Part 15.

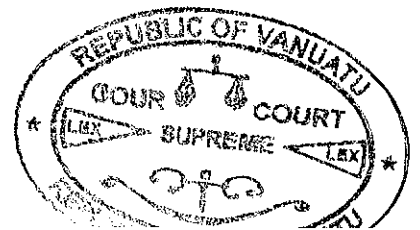
(5) Default judgment must not be given in the Magistrates Court before the first hearing date.

(6) The claimant must serve a copy of the judgment on the defendant.

(7) If the defendant does not apply within 28 days of service to have the judgment set aside under rule 9.5, the claimant may:

- (a) file a sworn statement that the judgment was served on the defendant as required by Part 5; and
- (b) apply to the court for an enforcement order."

4. It is sufficiently clear from the above that in order to obtain a default judgment the claimant must first establish that "the claim and response form was served on the defendant as required by Part 5" and **Rule 5.8 (2)** provides that personal service on a corporation (such as the defendant company) may be effected "by leaving a copy of the document at the registered office of the corporation".



5. In this latter regard the claimant has deposed in a sworn statement of service filed in Court on **12 April 2010**:

*"I did on Monday 12 April 2010 at 8.45 a.m. in the forenoon serve to KIEL of PKF office the SUPREME COURT CLAIM".*

The sworn statement also annexed a copy of a sworn proof of service addressed to the defendant company which records that the "Supreme Court Claim and Response" were received at "PKF Office" and was signed for by a person named "**Kiel**". Additionally, the claimant deposed in two (2) further sworn statements of service dated "3 June 2010" and "2 July 2010" respectively, that he personally served at "PKF House" a "Sworn Statement in Support of Claim" and later, a "Default Judgment".

6. The sole reason advanced in the application to set aside the default judgment is: "... (the defendant) *was never served with the claim in this proceeding.*" This is supported by a sworn statement dated 22 July 2010 from **Kelly Fawcett** "of PKF House" an employee of **International Trust Company Limited ("ITC")** who confirms that "ITC" is the registered office of the defendant company.
7. Significantly, **no** sworn statement has been filed by the ITC employee "**KIEL**" who accepted service of the original claim and response form and who appears to have witnessed service of the claimant's sworn statement in support of the claim on Kelly Fawcett on 3 June 2010.
8. Anyway, **Kelly Fawcett** deposes:

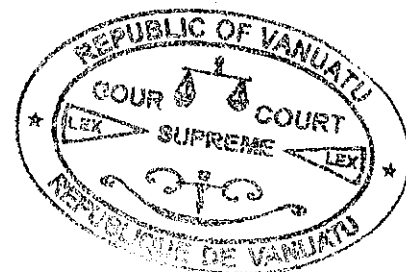
*"On or about 18 November 2009 a service agent endeavoured to serve a document upon us wherein the defendant was detailed as Martin Cabbe. The document was related to Marbledust Limited but we would not accept service for the named defendant. My co-workers email recording this to Martyn Cabbe is attached marked KF1."*

9. The relevant email reads:

*"Good afternoon Martyn,*

*Please find attached a scanned copy of Supreme Court documents that are to due to be served upon you. An officer came to our offices today but did not accept them as we act for the company, Marbledust Limited, rather than yourself as an individual. However we were able to take a copy which we now send to you for your reference.*

*Please let us know if we can assist in any way.*



*Kind regards,*

*Joana Saville  
International Finance Trust Company Limited."*

10. In that statement and email is a clear admission and acceptance that **Martyn Cabbe** is closely associated with the defendant corporation and although service was apparently declined, on the basis that the defendant corporation and not Martyn was the client, nevertheless, a copy was taken of the document and scanned to Martyn with an offer to "assist in any way".
11. The scanned document is nowhere identified in the sworn statement other than by the cryptic description "*the document was related to Marbledust Limited ...*" nor is a copy attached to the sworn statement as it could have been but, whatever the documents were, **Kelly Fawcett** deposes: "... (they) *are due to be served upon you*". Clearly she was aware of the need to personally serve court documents on a named defendant and of the legally independent nature of an incorporated company from its human representatives.

Having noted the foregoing, the deposed event is of marginal relevance in this particular case which was commenced in April 2010 (ie. almost 5 months after the abortive service).

12. **Kelly Fawcett** further deposes:

*"On or about 3 June 2010 we were served with a document "sworn statement in support of claim". I forwarded this to Martyn Cabbe. My email of that date is attached marked "KF2". We received no other document and particularly no claim in civil case No. 43 of 2010 and have never received any such document."*

13. Email "**KF2**" is dated "**June 3, 2010**" and reads:

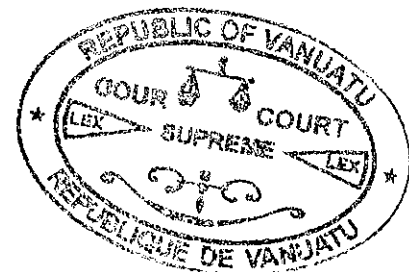
*"Dear Martyn,*

*Please find attached a scanned copy of Supreme Court documents that were served at our offices this afternoon as the registered office for Marbledust Limited.*

*We await your instructions on this matter.*

*Kind regards,*

*Kelly Fawcett  
International Finance Trust Company Limited."*



14. I note that the relevant email merely describes the scanned documents as "... *Supreme Court documents*" and not as deposed. It also confirms that "**ITC**" is the registered office of the defendant corporation and reaffirms the close ties between the defendant corporation and **Martyn Cabbe** from whom "*instructions*" were sought.
15. The claimant's "*sworn statement in support of the claim*" comprises seven (7) pages including a medical "100%" disability report and two (2) letters from the Department of Labour one (1) of which is dated "28 November 2007" addressed to "**Mr. Martin Cobbe, Manager Marble Dust Ltd.**" and sets out the Labour Department's calculation of the claimant's entitlements under the **Wokmens Compensation Act** [CAP. 202] for disability sustained from injury arising out of a work place accident.
16. In those circumstances given the title of the scanned document, "*sworn statement in support of claim*", it beggars belief that **no** enquiry was deposed as having been made either with the process-server or internally, with other staff of **ITC**, by **Kelly Fawcett** as to the whereabouts of the actual claim against the defendant corporation (its client) and which, she blithely deposes, was "... *never received*".
17. If enquiries were made (as they should have been), she may well have learnt and received a served copy of the substantive claim from "**KIEL**" which she could have sent with the claimant's sworn statement scanned to Martyn and would have given it greater meaning and a context.
18. Needless to say a "*sworn statement in support of a claim*" which is unaccompanied by a claim is incomplete and misleading and unlikely to prompt any meaningful "*instructions*".
19. Lastly **Kelly Fawcett** deposed:

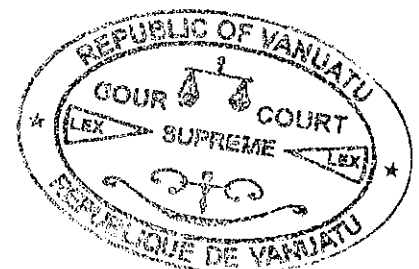
*"On or about 2 July 2010 we received service of a default judgment in proceedings 43 of 2010 and forwarded that to Martyn Cabbe. The relevant email from my colleague is attached marked "KF3"*.

20. In this instance, the email "**KF3**" is dated "**2 July 2010**" and reads:

*"Good Morning Martyn,*

*Please see attached Default Judgment that was delivered to our offices this morning by the Supreme Court.*

*Kind regards,*

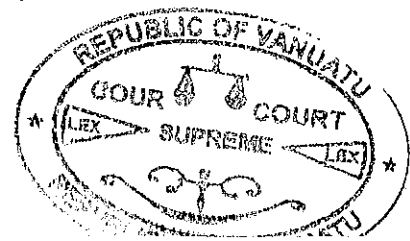


*Joanna Saville  
International Finance Trust Company Limited."*

The closeness of **Martyn** and the defendant company is again reinforced in the email which surprisingly fails to enquire about the claim on which default judgment was given.

21. On the above analysis, the sole sworn statement in support of the application is riddled with failures on **Kelly Fawcett's** part and must be considered both unhelpful and unreliable. Indeed the sworn statement is only remarkable by the deponent's failures to take the most basic steps and make the elementary enquiries that should logically have been made and taken in the circumstances.
22. Needless to say the formal entry of defence counsel into this action first occurred on 29 July 2010, four (4) months after the claim was served at the registered office of the defendant corporation and almost one (1) month after default judgment was served, and, in the sworn statement filed in support of the application, there is no attempt made to excuse or explain the five (5) month delay which occurred nor has **Martyn Cobbe** filed a sworn statement of his awareness of the claim. If I may say so that is not the behavior of a defendant that is concerned at the delay caused by its neglect and inertia.
23. In this regard too, although the claimant's opposition response post-dates the application to set aside the default judgment and the sworn statement of **Kelly Fawcett**, it does very clearly identify the date, place and person ("*Kiel*") to whom the substantive claim was served on 12 April 2010.
24. Although the response is not sworn on oath, a concerned and diligent defendant would have filed a sworn statement from the named recipient directly challenging and refuting the claimant's assertions of service of the claim or, at the very least, reasonable enquiries would have been made of the named recipient ("*KIEL*") by the person swearing the sworn statement in support of the application to set the default judgment aside. This did not happen in the present case.
25. I am satisfied from the foregoing that there has been strict compliance with the requirements of the relevant Rules dealing with service of the claim on the defendant corporation and that the condition precedent to the issuance of the default judgment had been met.
26. Having said that, although the request for default judgment follows FORM 12 for a "*fixed amount*", I am uncertain that that is the correct or proper Form to be adopted in the present claim as framed which includes prayers:

*"... for general damages under the heading for pain and suffering for the serious industrial accident" and*



“... for general damages under the heading for economic loss for 3 years at the minimum wages rate of VT20,000 per month.”  
(my underlining)

27. It is trite that “general damages” are conceptually and juridically different from “special damages”. As Lord Goddard observed in **British Transport Commission v. Gourley** (1958) AC 185 (at p. 206):

“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages which has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of the trial and is general capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like and if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.”

(my underlining)

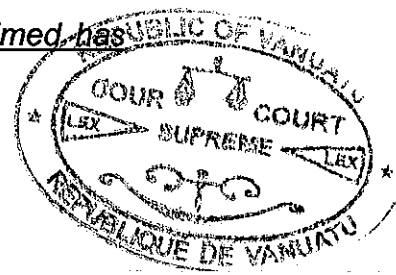
28. Plainly by its nature “general damages” are at large and require to be assessed based on the evidence, past court decisions, human experience, and common sense. It is not readily amenable to precise calculation and must therefore be left to the court to determine.
29. Having said that, the pleading distinction is somewhat blurred and ameliorated by the requirements of **Rule 4.10** of the **Civil Procedure Rules** which provides:

**“Damages**

**4.10** (1) If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.

(2) *If general damages are claimed, the following particulars must be included:*

- (a) *the nature of the loss or damage suffered; and*
- (b) *the exact circumstances in which the loss or damage was suffered; and*
- (c) the basis on which the amount claimed has been worked out or estimated.



(3) *In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.*

(my underlining)

30. By this Rule claimants are required when claiming damages whether "*special*" or "*general*" in nature "... *to state the nature and amount of the damages claimed*" and in the case of general damages, "... *the basis on which the amount claimed had been worked out or estimated*".

31. Furthermore, **Rule 9.3** which provides for default judgment in claims for damages clearly states in **subrule (4)**:

"(4) *The court may:*

(a) *give judgment for the claimant for an amount to be determined; and*

(b) *either:*

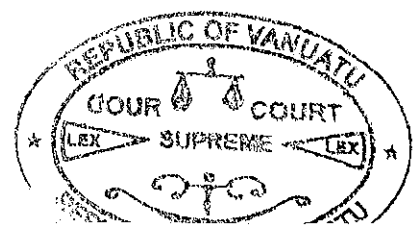
(i) *determine the amount of damages; or*

(ii) *if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages.*"

32. Given the above, the question(s) that arise are: (1) whether or not a claimant is capable of requesting and obtaining a default judgment for a fixed amount (claimed or estimated) in a claim for "*general damages*"? and (2) can the court in the exercise of its discretion to grant default judgment in a claim for "*general damages*" effectively convert it into a claim for a fixed amount by summarily determining the amount of damages where there is "*enough information before the court to do this?*".

33. After careful consideration of the claimant's undisputed sworn statement and annexures and mindful of the "*overriding objectives*" of the **Civil Procedure Rules**, I have reached the firm conclusion that the entry of default judgment for a liquidated sum was proper in this case and supported by the claimant's uncontested pleadings and evidence.

34. Furthermore, I find in terms of **Rule 9.5** that the defendant has failed to satisfy me that it had "... *shown reasonable cause for not defending the claim*" and that it has "*an arguable defence about its liability for the claim or about the amount of the claim*". In so finding, I reject the sworn statement of **Kelly Fawett** in her unhelpful denial of her "*client*" ever





receiving the claim in this case, other than, the default judgment and the claimant's sworn statement in support of the claim.

35. For the foregoing reasons the application is dismissed with costs which are summarily fixed at VT80,000.

**DATED at Port Vila, this 19<sup>th</sup> day of September, 2013.**



**D. V. FATIAKI**

**Judge.**

