DEFAULT JUDGMENT
COMMON RISKS AND PITFALLS

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The Problem

Where a defendant has been noted in default, the plaintiff may require the registrar to sign judgment against the defendant in respect of a claim for a debt or liquidated demand in money.[1] We are all familiar with this Rule 19.04(1). Many litigators regularly sign Requisitions for Default Judgment and obtain judgment "over the counter" because it is quick and easy and, I always thought, relatively risk free. Or is it?

Last May and June litigators at my firm noticed a slow-down in the turn-around time for default judgments on numerous debt collection and mortgage remedy statements of claim. At first, we assumed that the delays were just a temporary glitch that sometimes occurs at the Toronto Courts. Then we noticed that the local deputy registrars began returning our Requisitions for Default Judgment. They suddenly were refusing to sign default judgment "over the counter". The reason given by the local deputy registrars was that our claim was not liquidated.

But we were suing to recover a debt. How absurd, we thought! Until we spoke to and met with Deputy Registrar Richard Ittleman, for whom we have nothing but the highest respect. Deputy Registrar Ittleman explained that Rule 19.04(3) allowed the deputy registrars to decline to sign default judgment if uncertain whether the claim comes within the class of cases for which default judgment may properly be signed.[2] Mr. Ittleman expressed the concerns of the Toronto deputy registrars that some of the costs and expenses that we had been including in statements of claim for our lender clients resulted in these claims not being liquidated. Typically, these were

the costs that a lender regularly incurs while repossessing and preparing for sale the personal property that secures the loan in question as well as costs that the lender regularly incurs in obtaining possession of and selling the real property securing the loan in question.

Liquidated Demand

The concept that creates this difficulty is the defined term "liquidated damages" or "liquidated claim" or "liquidated demand". In order to qualify for a default judgment "over the counter", the statement of claim must include a claim for a "liquidated demand" in money.[3]

Simply put, a demand is "liquidated" if the amount claimed can be ascertained by calculation or fixed by any scale of charges or other positive data.[4] The simplest examples of liquidated amounts are fixed price contracts and contracts where the payments are set at an agreed upon hourly rate.

But it is those costs and expenses incurred by the plaintiff that are claimed in the statement of claim, *and which are not quantified in the contract*, that can prove to be more problematic; for instance legal fees, realty commissions, realty taxes, repair costs, bailiff fees, property management fees and other repossession costs as well as NSF charges, recovery fees and other default fees.

Often, lawyers claim these costs by outlining them in a paragraph of the statement of claim, simply stating that these specific costs were incurred, without additional particulars. When the amounts owing to the plaintiff/lender are itemized in the statement of claim, these costs are simply listed and included in the aggregate amount claimed to be owing. We had regularly obtained default judgment for the aggregate of all of these costs and expenses on this basis because we know that these costs are real, actual outlays that had been incurred and paid for by the lender. In that sense, they were certainly liquidated amounts. And on this basis, for many

years now, the Ontario bar has been obtaining default judgments without interference from the local registrars.

Common Law – defining liquidated demand

White J. in *Holden Day Wilson v. Ashton*[5] concluded that a claim can be identified as a "liquidated demand" depending on the answers to the following 5 questions:

1. *Is it ascertainable by calculation or by referring to a fixed scale of charges?*
2. *Can the calculation be made by reference to the agreement between the parties itself, or, at least, implied by the agreement?*
3. *Was the price or method of calculation of the price agreed upon by the parties?*
4. *Has the defendant obliged him/herself to pay a specific sum of money? and,*
5. *Was a reasonable estimated cost established by the parties?*

Some claimed costs, however, by their nature lend themselves to uncertainty more than others. For example, in *Hahn v. Wozniak*,[6] sale commission given to a lawyer for arranging a power of sale was held to be unliquidated because it is subject to an assessment of reasonableness. In the *Fletcher v.Wagg*[7] case the contract in question allowed for two mutually exclusive modes of payment, and a claim was decided to be unliquidated on that basis.

Legal fees, as well, have been given additional scrutiny.[8] However, in a recent Ontario case before the Divisional Court, *Capital One Bank v. Matovska*,[9] on appeal, the Court held that the legal fees of a credit card company plaintiff which were agreed to be a percentage of the outstanding debt on a contingency basis, is a liquidated demand as between the credit card company and its lawyer. Since the credit card agreement stated that the defendants would pay

the plaintiff any expense incurred to collect the debt, by implication, these legal fees were enforceable as a liquidated demand by the credit card company against its customer – the defendant.[10]

Even where "evidence" is required to calculate the amount claimed, the courts have suggested that this would not necessarily make the amount unliquidated. As an example, in a typical action for goods sold and delivered, the contract may set out the price per unit, but "evidence" has to be pleaded setting out the number of units sold and delivered. This type of claim is liquidated.[11] In the *Kennedy v. 315812 Ontario Ltd.*[12] case, it was acknowledged that a claim for the balance due in a typical real estate closing would be a liquidated demand even though it would normally involve such imprecise things such as the amount left in the oil tank. Most items would be readily calculable amounts, such as the pro rata share of taxes, if plead properly. In a case for amounts owing under a commercial lease, the court held that the amounts claimed for insurance, electricity, heat and water, janitorial services and repairs and maintenance were liquidated amounts. In giving its decision, and after having reviewed a number of cases, Master Sandler wrote:

> *"Thus it can be seen that even though evidence is necessary from outside the various contracts so as to insert the appropriate amounts in these various types of claims, the claims are considered to be liquidated."*[13]

Common Law – pleading particularity

But the ability to look outside of the contract for external evidence, must be construed in light of the following cases requiring that the statement of claim itself contain sufficient particulars of the liquidated amount so that the registrar can ascertain whether the cost or expense is liquidated.

In GMAC *Leaseco Corp v. Perruzza*[14] Master Dash relied on *Holden Day Wilson v. Ashton*[15] for the proposition that one must be able to calculate the amount claimed by looking only at the Statement of Claim. A long line of case law, including *Holden Day Wilson v. Ashton*[16] makes clear that one is not permitted to look at any external evidence.[17]

Thus, for example, if there is a claim for outstanding interest but the interest rate is not pleaded, then the registrar cannot verify that the amount claimed is accurate and would not, therefore, be able to sign judgment over the counter. In the *GMAC Leaseco*[18] decision, the Master ruled that it was incorrect to just claim "unpaid taxes and fees" in a lump sum without specifying each cost individually in the statement of claim. In the *Transportaction Lease Systems v. Topping*[19] case, the date of default was not pleaded, making it impossible to calculate certain amounts.

The statement of claim, therefore, must contain all of the information required to calculate the amount owing – otherwise, *the registrar may be uncertain whether the claim is a liquidated demand*. In another much cited Ontario decision, the court in *Fletcher*[20] held that the amount claimed must be already ascertained or capable of being ascertained as a mere matter of arithmetic.

Summary

The law should not prevent a lender from recovering what was contracted for. So long as the contract clearly permits a charge, then it should be recoverable by way of default judgment signed over the counter. However, if the contract is not clear or if the pleading is not particular, the Court may be unable to grant default judgment over the counter. Conversely, if the contract is clear and precise and the claim is pleaded properly, one should be able to recover all legitimate collection expenses as part of a liquidated claim.

Practical Lessons

There is ample case law that permits a court to set aside a default judgment if it was signed by the registrar (over the counter) but was not one that is permitted by the Rules to be the subject of a default judgment.[21] In other words, if one were to obtain default judgment over the counter in a situation where the amount claimed was not liquidated or, even if liquidated, where the pleadings were not sufficiently particular to allow the registrar to make that determination, the court will set aside the default judgment.

The deficiency in a pleading does not change the nature of the cost or expense in question. However, the deficiency in a pleading can create uncertainty on the part of the registrar. It is this distinction that appears to have caused the current change in policy at the Toronto courts last Spring. The costs and expenses that are being charged by our lender clients are certainly liquidated (the majority of them anyway). It is therefore incumbent on the solicitor to ensure that the statement of claim includes particulars of those cost and expense so as to enable the deputy registrars to be confident that those costs and expenses are in fact liquidated.

While it may, in the past, have been acceptable to the courts to simply state that costs and expenses were incurred and to include them in the calculation of the amounts owing, for instance, as follows:

Principal balance owing		$1000.00
Interest to [date]		$50.00
Less sale proceeds	($200.00)	
Cost to repair	$50.00	
Commission	$50.00	
Net sale proceeds		($100.00)
Total Claimed		**$950.00**

It appears that a separate paragraph specifically setting out the nature of the repair and/or commission, to whom it was paid, when it was incurred, etc. is mandatory. All claimed costs and expenses ought to be carefully documented and details by the plaintiff and details provided to the lawyer so that each item can be pleaded with sufficient specificity (particularity). Certain items that may be included in a demand letter, for instance, will be better off waived at the outset (e.g. certain fees charged for recovery or delinquency that may not be specifically provided for in the contract) to keep the claim within the definition of a "liquidated demand". But in order to ensure that your statement of claim may properly be signed over the counter, and not be subject to being set aside by reason only that the registrar or deputy registrar ought not to have signed the judgment, counsel must:

- satisfy itself that the cost or expense is liquidated (capable of being quantified by calculation)
- ensure that the defendant agreed to pay such cost or expense in the contract between the plaintiff and defendant
- plead with particularity the obligation of the defendant to be responsible for the cost or expense or to reimburse the plaintiff for the cost and expense
- plead the exact amount of the cost and expense or the exact manner in which the cost and expense was calculated (for instance, an agreed upon cost of $100 each month and the number of months for which the plaintiff is entitled to charge that cost).

With a little care and more particularity than was previously the case, our Requisitions for Default Judgment and our judgments will be signed by the local registrars over the counter and we will be confident that an application to set aside the judgment because the local registrar ought not to have signed the judgment in the first instance, can be resisted.

ENDNOTES

[1] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 19.04(1)(a).

[2] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 19.04(3)(a).

[3] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 19.04(1)(a).

[4] *J. Cooke (Concrete Blocks) Ltd. v. Campbell*, [1947] O.W.N. 713 (H.C.) at para. 6; *Cantalia Sod Co. Ltd. v. Patrick Harrison & Co. Ltd.*, [1968] 1 O.R. 169 (H.C.) at para. 3.

[5] *Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266 (Div. Ct.) at para. 36.

[6] *Hahn v. Wozniak* (1978), 12 C.P.C. 130 (Ont. H.C.J.) but note the sale commission referred to here was to the solicitor that arranged the sale of a mortgaged property under power of sale – it is not clear that the same view would be taken with "standard" sales commissions paid to a real estate agent.

[7] *Fletcher v. Wagg* (1975), 11 O.R. (2d) 411 (H.C.).

[8] *Hahn v. Wozniak* (1978), 12 C.P.C. 130 (Ont. H.C.J.); also see *Holden, supra* note 5.

[9] *Capital One Bank v. Matovska*, 2007 CanLII 37015 (Ont. Div. Ct.).

[10] *Ibid.* at para. 7.

[11] *Viking Shopping Centres Ltd. v. Foodex Systems Ltd.* (1975), 11 O.R. (2d) 503 (H.C.J.) at para 19.

[12] *Kennedy v. 315812 Ont. Ltd.* (1976), 2 C.P.C. 281 (Ont. H.C.J.) at para. 9.

[13] *High Point Management Services Ltd. v. Royal Bengal Restaurant Ltd.* (1978), 6 C.P.C. 263 (Ont. Master) at para. 24.

[14] *GMAC Leaseco Corp. v. Perruzza,* 2006 CanLII 25272 (Ont. Master) at para. 8.

[15] *Holden Day Wilson v. Ashton, supra* note 5.

[16] *Ibid.* at para. 16.

[17] *GMAC Leaseco Corp. v. Perruzza, supra* note 15 at para. 15.

[18] *GMAC Leaseco Corp. v. Perruzza, supra* note 15 at para. 14.

[19] *Transportaction Lease Systems Inv. v. Topping*, 2007 WL 1578466 (Ont. S.C.J.) at para. 13.

[20] *Fletcher v. Wagg* (1975), 11 O.R. (2d) 411 (H.C.) at para 7.

[21] *GMAC Leaseco Corp. v. Perruzza, supra* note 15 at para. 9.