[2017]JMCC Comm 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00392

BETWEEN NAETYN DEVELOPMENT COMPANY LIMITED CLAIMANT

AND KIRK HOLBROOKE DEFENDANT

IN CHAMBERS

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright and Company for the Claimant

March 3 and April 28 2017

Default judgment– Application for - Civil Procedure Rules, 2002 Rule2.4 and Part 12

SIMMONS J

[1] This is an application by the claimant, Naetyn Development Company Limited, for judgment to be entered in default of acknowledgment of service.

[2] The claim in this matter arises out of a contract between the parties whereby the defendant agreed to erect two apartment buildings containing twelve strata units on premises situated at Edinburgh Avenue, Kingston 8 in the parish of St. Andrew. Specific tasks were reserved for the performance of the claimant. The project was to be completed by August 31, 2015.

[3] The sum of sixty two million four hundred and twenty nine thousand and ninety nine dollars and sixty eight cents ($62,429,099.68) was allegedly paid to the defendant by the claimant for use in the performance of the construction works. The claimant has

asserted that only forty two million seven hundred and four thousand nine hundred and thirty five dollars and eighty cents ($42,704,935.80) was used by the defendant.

[4] It is alleged that the defendant failed to complete the project and ceased works on or about October 31, 2015.

[5] By way of Claim Form dated and filed December 6, 2016 the claimant commenced proceedings against the defendant for the "unspent sum" of nineteen million seven hundred and twenty four thousand one hundred and sixty three dollars and eighty eight cents ($19,724,163.88). It has also claimed additionally or in the alternative, damages for breach of contract, special damages, interest at the average commercial bank's rate for such period as the court deems just pursuant to the ***Law Reform (Miscellaneous Provisions) Act*** and costs.

[6] The Particulars of the Breach of Contract are that:-

(i) the defendant failed to complete the contract works on time, or at all in accordance with the agreement between the parties or within a reasonable time;

(ii) the defendant ceased works on the contract without the consent of the claimant and without completion of the tasks agreed;

(iii) the defendant failed to use the full sum of $62,429,099.68 in the performance of the contract works; and

(iv) the defendant failed to return the remainder of the funds not used in the performance of the works upon cessation ($19,724.163.88).

[7] Special damages have also been claimed in the sum of thirteen million eight hundred and ninety three thousand six hundred and seventy three dollars and four cents ($13,893,673.04). That sum represents:-

(i) Loss of rental income from August 2015 and

	continuing for 11 one bedroom apartments	
	and 1 two bedroom apartment;	$12,825,000.00
(ii)	Cost of the quantity surveyor's report	$990,423.04
(iii)	Cost of the Valuation Opinion-	$58,250.00
(iv)	Filing cost	$20,000.00

[8] The time within which the defendant was permitted to file an acknowledgment of service expired and the claimant filed a request for default judgment for the sum of thirty four million fifty nine thousand one hundred and seventy four dollars and five cents ($34,059,174.05). The Registrar declined to enter the judgment and sent a requisition to the claimant's attorney indicating, among other things, that the claim appeared to be a mixed claim for which default judgment via the administrative route could not be granted unless the "specified portion of the claim was severed from the unspecified part".

[9] This has culminated in the claimant filing a Notice of Application which is now being considered. The said Notice of application seeks an order that:-

(i) The default judgment be granted in favour of the claimant;

(ii) The terms of the default judgment be as set out in the request for default judgment filed in the court on January 19, 2017; or

(iii) In the alternative, that default judgment be entered for an amount to be decided by this Honourable Court

(iv) Costs to the claimant to be taxed

[10] The issue which falls for my consideration is whether a default judgment can properly be granted in terms of the Request for Default Judgment.

Claimant's Submissions

[11] Counsel for the claimant submitted that this is a proper case for the entry of a default judgment because no acknowledgement of service has been filed. Mrs. Taylor-Wright argued that a default judgment is granted in circumstances where there is an element of default and unlike an application for summary judgment there need be no consideration of the merits of the claim. She contended that the court must take the statement of case as true.

[12] She drew the court's attention to rule 12.4 of the ***Civil Procedure Rules*** (***CPR***) which addresses the conditions to be satisfied before a default judgment can be granted.

[13] Counsel submitted that, pursuant to rule 12.8 (3) of the ***CPR***, the claimant is entitled to abandon its claim for general damages and proceed to ask for default judgment on the specified sum. However, it was her submission that this need not be done. She relied on the Grenadian case of ***Matthew Harris v Lindsay Mason*** GDAHCVAP 2014/0028 (October 2014)[1] in support of her position.

[14] Mrs. Taylor-Wright pointed out that rule 2.4 of the ***CPR*** defines a claim for a specified sum of money. She further submitted that the inclusion of costs and interest does not mean that the claim is not one for a specified sum. She cited rule 12.8(1 of the ***CPR***) in support of her submission.

[15] Counsel also argued that the court is entitled to treat the sum claimed as special damages as a claim for a specified sum. In this regard, she relied on the authority of ***Merito Financial Services Limited v Yelloly*** 2016 EWHC 2067. Mrs. Taylor-Wright stated that the claim for special damages is particularised in the Particulars of Claim and the fact that the claim is not as detailed as previously required under the old rules, does not take it outside of the definition of specified sum in the ***CPR.***

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[1] Eastern Caribbean Court of Appeal

[16] Having regard to the foregoing, she submitted that this is a proper case for the entry of a default judgment.

Discussion

[17] Part 12 of the ***CPR*** deals with the entry of default judgments. Rule 12.1 states as follows:-

> *"(1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant-*
>
> *(a) Has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or*
>
> *(b) Has failed to file a defence in accordance with Part 10.*
>
> *(2) Such a judgment is called a '**default judgment**'"*

[18] Rule12.4 states the conditions which are to be satisfied in order to obtain a judgment in default of acknowledgment of service. It reads:-

> *"The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if-*
>
> *(a) The claimant proves service of the claim form and particulars of claim on that defendant;*
>
> *(b) The period for filing an acknowledgement of service under rule 9.3 has expired;*
>
> *(c) That defendant has not filed-*
>
> *(i) An acknowledgment of service; or*
>
> *(ii) A defence to the claim or any part of it;*
>
> *(d) Where the only claim is for a specified sum of money apart from costs and interest, that defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;*

(e) That defendant has not satisfied in full claim on which the claimant seeks judgment; and

(f) (where necessary) the claimant has permission to enter judgment.

[19] Rule 9.2 (1) of the ***CPR*** states:-

"A defendant who wishes-

(a) to dispute the claim; or

(b) to dispute the court's jurisdiction,

must file at the registry at which the claim form was issued an acknowledgement of service in form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgment of service to the claimant or the claimant's attorney-at-law."

[20] Rule 9.2 (5) states:-

"However the defendant need not file an acknowledgement of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in rule 9.3."

[21] Significantly, rule 9.2 (6) states:-

"Where a defendant fails to file either an acknowledgment of service or a defence, judgment may be entered against that defendant if Part 12 allows it."

[22] In an affidavit sworn on January 12, 2017, Mr. Paul Wong deponed that on Tuesday, January 3, 2017 at about 2:30 pm he went to Oaklands Proprietors Limited at 114½ C Constant Spring Road, Kingston 8, as was agreed between himself and the defendant. Mr. Wong stated that the defendant who he had known for over twenty years was waiting there and was served with the claim form, particulars of claim and the accompanying documents.

[23] In the fourteenth edition of the text, ***'A Practical Approach to Civil Procedure'***

the learned author, Stuart Sime, on page 172, states the following:-

> *"Judgment in default may be entered where the defendant fails to defend a claim. It produces a judgment in favour of a claimant without holding a trial. The procedure is designed to prevent unnecessary expenditure of time, money, and court resources in protracted litigation over undefended claims. It is appropriate where the defendant is not defending on the merits."*

The learned author continues:

> *"Actually entering a judgment in default is usually a purely administrative matter, and involves no consideration by the court of the merits of the claim. All the claimant usually has to do, once the time for responding to the claim has elapsed, is to return a request form to the court asking for judgment to be entered. This will then be acted upon by the administrative staff at the court, and a judgment will be entered. Such a judgment binds the defendant just as much as if it had been entered after a contested trial, and may be enforced in the normal way. However, it does not give rise to an estoppel per rem judicatam and may be set aside if the defendant can show a real prospect of defending the claim."*

[24] The foregoing position was reinforced by P. Williams JA (Ag) (as she then was), in the Court of Appeal decision of ***Frank I Lee Distributors Ltd v Mullings & Company (A Firm)*** (unreported) Court of Appeal, Jamaica, [2016] JMCA Civ 9, judgment delivered 12 February 2016. The learned Judge of Appeal said the following:-

> *"The entering of the default judgment is regarded as a purely administrative procedure. The attitude of the courts has always been not to easily deprive a party the right to having their matter heard and thus the need for the court to have the power to set aside judgments entered without a full consideration of the merits of the claim."*

[25] The administrative nature of the rule was discussed by Mangatal J in ***RBC Royal Bank (Jamaica) Limited (formerly RBTT Bank (Jamaica) Ltd.) and RBC Royal Bank (Trinidad and Tobago) Limited (formerly RBTT Bank Ltd.) v Delroy Howell***

(unreported), Supreme Court, Jamaica [2013] JMCC Comm. 4. The learned Judge said:-

> *"When the registry enters a default judgment, it is a purely administrative matter. It involves no consideration of the merits of the claim. I agree with Sykes J.'s analysis of the nature of the default judgment entered by the registry, as set out in his judgment in* ***Issa****, at paragraphs 76, 103 and 104. Sykes J. was there discussing Rule 12.5, which deals with judgments in default of defence. However, his observations are just as applicable to judgments in default of acknowledgment of service and Rule 12.4. Sykes J. there stated:*
>
> > *'76. This rule is very plain. Once the conditions, both positive and negative, have been met, the Registrar must enter judgment on the application of the claimant. There is no discretion here. It is simply a box-ticking exercise….*
> >
> > *103. …The request for default judgment was intended to be a simple, uncomplicated and speedy process. That is why it does not import any element of discretion. …*
> >
> > *104. The design of the rule was deliberate. It eschewed any application of discretion(ary) with all of the potential difficulties that that can entail. The Rules Committee did not wish the Registrar to become embroiled in controversy over whether the discretion should be exercised in this way or the other…'."*[2]

[26] The claimant has in accordance with rule 5.5 of the ***CPR*** provided proof that the defendant was served with the Claim Form, Particulars of Claim and the accompanying documents. The time period allotted to the defendant to file an acknowledgment of service and defence has also expired. Without more, it appears that this is a proper case for the entry of a default judgment as the rules make it clear, that the entry of a

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[2]Paragraph 15

default a judgment is not grounded on the merits of the claim but on the defendant's failure to defend the claim.

'Mixed Claim'

[27] The Registrar's decision not to enter the default judgment in this matter was based on the premise that the claim was a "mixed claim" and was therefore not one that could be administratively entered. It seems that this term was used to refer to a claim in which a specified sum as well as an unspecified sum is being claimed.

[28] The ***CPR*** does not use the term "mixed claim". Where the procedure for the entry of default judgments is concerned I wish to highlight rules 12.7, 12.8 (3) and 12.10.Rule 12.7 (as amended) states:-

> *"Subject to rules 12.9(4), 12.10(1)(c)(iii) and 12.10(4) a claimant may obtain a default judgment by filing a request in form 8"*

[29] Rules 12.9(4), 12.10(1)(c)(iii) and 12.10(4) are not applicable to the present case.

[30] Rule 12.10 which deals with the nature of a default judgment reads:-

> *"(1) Default judgment-*
>
> *(a) on a claim for a specified sum of money, shall be judgment for payment of that amount or, where part has been paid, the amount certified by the claimant as outstanding-*
>
> > *(i) (where the defendant has applied for time to pay under Part 14) at the time and rate ordered by the court, or*
> >
> > *(ii) (in all other cases) at the time and rate specified in the request for judgment.*
>
> *(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court."*

[31] Rule 12.8 (3) states:-

> *"Where a claim is partly for a specified sum and partly for an unspecified sum the claimant **may** abandon the claim for the unspecified sum and enter default judgment for the specified sum."*

[My emphasis]

[32] The use of the word 'may' in my view, indicates that a claimant who has applied for judgment for a specified sum need not abandon the claim for an unspecified sum. This represents a departure from the position prior to the ***CPR*** where under the ***Civil Procedure Code Law***, a claimant was required in those circumstances to abandon the claim for the unspecified sum.

[33] In ***Matthew Harris v Lindsay Mason*** (supra) the issue before the court was whether the default judgment was irregularly obtained. In that case a default judgment was entered against the appellant for the specified sum of thirty thousand nine hundred and seventy six dollars ($30,976.00) and for general damages to be assessed. The appellant later sought to set aside the default judgment on the basis that the default judgment so entered was irregular.

[34] In his judgment, the learned Master in the lower court found that neither rule 12.8(3) of the ***Eastern Caribbean Civil Procedure Rules 2000*** (***CPR 2000***) which is identical to rule 12. 8(3) of the ***CPR*** or rule 12.10 (1) of the ***CPR 2000*** which mirrors rule 12.10 (1) of the ***CPR***, precluded default judgment from being entered for a specified sum of money and also for an unspecified sum of money. In those circumstances, the court found that the default judgment so entered was not irregular and refused to set aside the default judgment. The appellant appealed.

[35] The appeal was dismissed and the order of the learned Master was affirmed. The court found that although, ***CPR 2000*** does not expressly deal with default judgments in relation to mixed claims (a claim for both a specified sum of money and for an unspecified sum of money), there is no provision which precludes the entry of judgment in those circumstances. It was held that it is clear that the combined effect of rules

12.8(3) and 12.10 of the ***CPR 2000*** is that a default judgment may be entered for both a specified sum of money and also for an unspecified sum of money.

[36] The court also found that rule 12.8(3) of the ***CPR 2000*** is not expressed in mandatory terms and as such when entering default judgment in a claim for a specified sum of money and for an unspecified sum of money, the claimant need not abandon the claim for the unspecified sum of money and enter default judgment only for the specified sum of money. It is left completely to the claimant to decide whether he or she wishes to abandon or pursue the claim for the unspecified sum of money.

[37] Pereira CJ, in delivering the judgment of the court said:

> *"Further CPR 12.8(3) is not couched in mandatory terms. This is for good reason. It would not be right as a matter of law or fairness to force a claimant to abandon a perfectly good claim for an amount to be assessed merely because that claimant wishes to have a final judgment by default in respect of a perfectly good claim for a specified sum. CPR8.4 makes expressly clear that a claimant may include in a claim form all or any other claims which may be conveniently disposed of in the same proceedings. This is also for good reason, not the least of which is the saving of time and expense. It would be incongruous to encourage such an approach in the making of all your claims in one proceeding, only to be forced to abandon one or more claims, because of a defendant's default, in obtaining judgment against the defaulter."*

[38] She also said:

> *"...it becomes readily apparent that the conjoint effect of CPR 12.8(3) and12.10(1) is that a default judgment may be entered for both a specified sum of money and an unspecified sum of money. It is left completely to the claimant to decide whether he/she wishes to abandon the claim for an unspecified sum. Where the specified sum claimed is, in essence, equivalent to the damages which may be obtained for breach of contract as is the case here, the claimant may very well consider that it is not worth the trouble to pursue the claim for further damages which may incur further time and expense."*

[39] I agree with the reasoning of Pereira CJ in the above case. There is no need for the claimant to abandon its claim for an unspecified sum in order to obtain judgment for a specified sum.

Is the claim in the present case one for "a specified sum of money"?

[40] In this matter although the claim includes one for damages for breach of contract the application for default judgment makes no specific reference to it. The application requests judgment in the sum of thirty four million fifty nine thousand one hundred and seventy four dollars and five cents ($34,059,174.05). It is particularized as follows:-

Amount claimed	$33,772,826.92
Together with interest from December 6, 2016 to date	$244,274. 80
(Daily rate since= $551.70 per day)	
Court fees on claim	$20,000.00
Attorneys-at-Law's fixed costs on issue	$10,000.00
Together with interest from date of issue to today	$72.33
Attorneys-at-Law's fixed costs on entering judgment	$12,000.00
Total	**$34,059,174.05**

[41] I have assumed that the thirty three million seven hundred and seventy two thousand eight hundred and twenty six dollars and ninety two cents ($33,772,826.92) includes the sum claimed for loss of rental income, special damages and interest.

[42] Rule 2.4 of the ***CPR*** defines a "claim for specified sum of money" as:-

> *"(**a**) A claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic **and is recoverable under a contract**; and*

(b) For the purposes of Parts 12 (default judgment) and 14 (judgment on admissions) , a claim for-

(i) *the cost of repairs executed to a vehicle;*

(ii) *the cost of repairs executed to any property in, on or abutting a road; or*

(iii) *any other actual financial loss other than loss of wages or other income, claimed as a result of damage which it is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copes of receipted bills for the amounts claimed are attached to the claim form or particulars of claim*."

[My emphasis]

[43] Rule 12.4 (1) (a) of the ***Civil Procedure Rules (UK)*** which deals with the procedure for the entry of default judgments states:-

"(1) Subject to paragraph (2), a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for –

(a) a specified amount of money;

(b) an amount to be decided by the court;

(c) .....

(d) Any combination of these remedies."

There is however, no definition of the term "specified amount of money".

[44] In the text, ***Civil Procedure, 2004***, Volume 1, "the White Book" at paragraph 12.4.3, the learned authors by way of explanation of the term, stated:-

*"**a specified amount of money**"*

> *The former term "liquidated sum" is replaced by "specified amount of money". Default judgment can be entered for the specified sum, plus interest pursuant to r.12.6, plus fixed costs pursuant to r.45.4.* ***However, it is important to note that "a specified sum of money" is wider than the old term "liquidated sum". Clearly it covers a case where the claim is for a debt. However, it appears that "a specified amount of money" covers any case where the claimant puts a figure on the amount of his claim whether it is debt, damages or any other sum.*** *If the claimant chooses to put a value on his claim in a specified sum, the claimant can request a default judgment in that sum (plus interest if claimed: see r.12.6) and fixed costs (see r.45.4)."*

[My emphasis]

[45] Accordingly, in ***Merito Financial Services Limited v Yelloly*** (supra), Master Matthews stated the following:-

> *"In my judgment the notion of a claim for "a specified amount of money" is prima facie apt to cover the case of a claimant who in his particulars of claim alleges, with full particularity, that the defendant negligently caused him pain and suffering to the value of £X, loss of earnings in the sum of £Y, and damage to property in the sum of £Z, and then claims the specific sum of £(X+Y+Z). Of course, in the usual case of a road traffic or clinical negligence claim, it would be unusual that the claimant was in a position to particularise all the losses caused in such a precise fashion at so early a stage."*

He continued:

> *"It is not necessary for the Claimant actually to prove his case. The nature of a default judgment is that his allegations are unchallenged, and therefore must be accepted as true for the purposes of the judgment: CPR 12.11. It is therefore necessary to examine the particular allegations made, to see if they amount to a claim for "a specified amount of money", or on the other hand an allegation of a breach of some duty which requires loss and quantum to be assessed before the court can award damages or equitable compensation.*

> *There are three aspects to this enquiry. One is how the claim is formulated in summary terms in the Claim Form. The second is how it is set out in detail in the body of the particulars of claim. The third is what remedy is or remedies are sought in the prayer at the end of the particulars of claim. Each of these must be considered. I have already set out the substance of the claims in the Claim Form ...In my judgment it is not necessary that the prayer itself should contain an express claim to a specific sum of money, as long as the statements of case taken together do so. It is simply a question of what the Claimant's "statement of case" appears to the court to justify."*

[46] Later on in his judgment Master Matthews also stated the following:-

> *"So far as the claim for damages or equitable compensation is concerned, this again might suggest that it is not a claim for "a specified amount of money". **However, as I have said, there seems to be nothing wrong with a claim for damages being liquidated in the particulars of claim so as to be for a specified sum**, as indeed the notes to Civil Procedure already referred to suggest. The question for me, therefore, is whether any such claim has been so liquidated.*
>
> [My emphasis]

[47] The highlighted portion conveys that if the claimant simply includes a claim for damages in the claim form once that the amount is set out in the particulars of claim, it may be regarded as a claim for a specified sum of money. If I were to adopt this reasoning, the sum claimed in the application for judgment could be regarded as one for a specified sum.

[48] It is however, my view that the definition of the term in the ***CPR*** is not as wide as that which obtains in the United Kingdom. Though the portion often emphasised in the definition is '*a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic'*, a plain reading of rule 2.4 of the ***CPR*** suggests that only sums referable to contracts, cost of repairs to a vehicle, cost of repairs to any property in, on or abutting a road and any other financial loss (save and except loss of wages or other

income) claimed as a result of damage alleged to have been caused in an accident, fall to be considered within the definition.

[49] In the consolidated appeal of ***Singh & others v Kingston Telecom & another*** (unreported) Court of Appeal, Jamaica, SCCA No. 48/06 and ***Ocean Petroleum U.S.A. Inc. v Kingston Telecom & others*** unreported Court of Appeal, Jamaica SCCA No. 25/05, judgment delivered 10 July 2009, the court was concerned with whether a default judgment that was entered for a specified sum of money ought to have been set aside. Having found that the claim against the appellants was not one for an *"ascertained sum of money or for a sum capable of being ascertained as a matter of arithmetic"* Smith JA said:-

> *"The mere device of inserting in the claim a specific sum when in fact the claim is really for an unspecified sum of money does not entitle the claimant to enter judgment for the payment of that amount. This principle may be extracted from* ***Birbari Ltd. v Freda Birbari and another 23 W.I.R 98*** *- a pre CPR decision".*

[50] In ***Singh & others v Kingston Telecom & another*** (supra) the respondent had filed a claim against the appellants for the sum of United States one million eight hundred thousand dollars (US$1,800,000.00) being the estimated amount due and owing under a contract. It also claimed damages for breach of contract and fiduciary duties. Judgment was entered for a specified sum of money. However, the court stated that this was only permissible where the claim itself was for a specified sum. In that case Smith JA having considered the breaches that were alleged against the appellants stated that in order to ascertain the amount to which the claimant was entitled the court would have to examine the extent to which the appellants had failed to supply the telecommunications services as well as the nature of the breach of fiduciary duty and the consequential loss.

[51] In ***Birbari Ltd. v Freda Birbari and Another*** (supra) the respondents had sought to recover damages for breach of contract from the appellant to whom it had leased certain premises. Those damages included sums spent on repairs to the premises as well as a telephone bill. The court found that the sums spent on repairs

were not sums payable under the contract and that the lease did nothing more than impose certain obligations on the appellant. Graham-Perkins JA stated:-

> *"...a right to recover damages for breach 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, eg* Abbey Panel and Sheet Metal Co Ltd v Barson Products *([1947] 2 All ER 809, [1948] 1 KB 493, [1948] LJR 493). 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 the expenditure they chose to incur."*[3]

[52] Where the telephone bill was concerned the court found that under the contract the appellant was required to pay those charges and as such, that sum could "fairly be described as '*a specific sum of money due and payable under or by virtue of a contract'."* The said sum would therefore, constitute a debt or liquidated demand.

[53] Having expressed the view that the interpretation given by the courts in the United Kingdom seems to be far more liberal with respect to what is regarded as a specified amount of money, the reasoning in ***Merito Financial Services Limited v v Yelloly*** (supra) must be viewed in that context. In this regard, I have noted that in that case, Master Matthews expressed the view that a claim for loss of earnings may be included in a claim for a specified amount of money. However, that type of loss is

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specifically excluded from the definition of the term *"specified sum of money"* in the ***CPR***.

[54] The fact that the ***CPR*** defines a claim for a specified sum of money is significant. The sum which the claimant seeks to recover includes loss of rental income, a sum said to be an amount not utilized in the construction, the cost of the Quantity Surveyor's Report and the cost of the Valuation Opinion as well as the court cost for filing the Claim.

[55] In order to be recoverable, those sums must fall within the definition given by rule 2.4 of the ***CPR***. It is however my view, that with the exception of the "unused sum" they are not recoverable under the contract but are instead, consequential losses which must be the determined on an assessment of damages.

[56] Where the "unused sum" is concerned, whilst it is clear that it is recoverable under the contract, there is nothing in the pleadings which speaks to how that sum was arrived at. There is only a bald statement that forty two million seven hundred and four thousand nine hundred and thirty five dollars and eighty cents ($42,704,935.80) was used in the performance of the works leaving a remainder of nineteen million seven hundred and twenty four thousand one hundred and sixty three dollars and eighty eight cents ($19,724,163.88).

[57] In order to fall within the definition of a specified sum of money the sum in question must also be *"ascertained or capable of being ascertained as a matter of arithmetic".* In this matter, a figure has simply being thrown at the court. No evidence has been presented in this application to assist in the determination of whether the sum has in fact been ascertained or is capable of being ascertained as a matter of arithmetic. In this regard, I bear in mind that this matter is concerned with the breach of a construction contract. It is therefore my view that in order to determine whether there is any money owing to the claimant there would have to be an assessment of the value of the work that has been done. In addition, it has been pleaded that the claimant was required to perform certain tasks. The question may arise as to whether it has in fact,

performed those tasks and if not, whether that has had an impact on the defendant's performance of its obligations. Those issues should be in my view be dealt with at an assessment of damages.

[58] I therefore find that the sum for which judgment is being sought cannot properly be described as a "specified sum" as defined in the ***CPR***.

[59] In the circumstances it is ordered as follows:-

(i) Judgment is entered in favour of the claimant for damages to be assessed;

(ii) Costs of this application to be costs in the claim;

(iii) Permission to appeal is granted.