

M E M O R A N D U M

DATE: 07 December 2011
RE: Undefended claims for liquidated and unliquidated sums in Australia, England and Canada

Summary of memorandum

- [1] The rules for default judgment in other jurisdictions are largely the same as in New Zealand, with registrars and clerks being able to enter default judgment for liquidated sums (or an equivalent concept by a different name). An exception is in the Federal Courts of Canada, where all default judgments must be heard by the court.
- [2] The term “a specified sum of money” in England and Wales is wider than a “liquidated sum”, and so a registrar can enter judgment for some claims that are not liquidated, as long as it qualifies as a “specified sum of money”. British Columbia and Quebec similarly do not use the wording “liquidated sum” and may therefore yield similar results.
- [3] Other than that, none of the jurisdictions I considered allows registrars/clerks to enter default judgment for undefended claims for unliquidated sums, other than as to liability.
- [4] Most jurisdictions (excluding Alberta and Ontario) allow the registrar/clerk to enter judgment as to liability only for unliquidated sums, with damages/quantum to be assessed by a judge.
- [5] Some jurisdictions (Australia, England and Wales, Alberta, and Ontario) still have special provisions for claims for recovery of possession of land or chattels.

Australia

- [6] In Australia, the position is largely the same as currently in New Zealand, and is largely uniform across the different states and territories.
- [7] A plaintiff may seek a default judgment from the registry if the claim is for a debt or liquidated sum (including interest).¹ A claim is liquidated if a formula or scale fixes its amount without recourse to assessment or opinion.² A defendant could adduce affidavit evidence alleging that the claim was not, in fact, liquidated in an application to set aside the judgment.
- [8] If the claim is for unliquidated damages, the registry can enter an *interlocutory* default judgment establishing the defendant’s liability to pay damages, in an amount the court will assess. The court then assesses the damages at a hearing. Only when damages are assessed does the judgment become final.³ I do not know whether, in practice, the court considers both liability as well as quantum at the hearing.
- [9] Special rules for default judgment for the recovery of possession of land or goods and for mesne profits (if liquidated) still exist.⁴ Note that in ACT and NSW, the plaintiff must file an affidavit to obtain a default judgment for recovery of possession of land.
- [10] It appears the overriding question in determining if a default judgment can be given in the registry or only by a court is whether or not discretionary relief is sought.⁵ In claims for

¹ ACT: r 1120; FCR: r 5.23; NSW: r 16.6; NT: r 21.03; Qld: r 283; SA: r 229; Tas: r 347; Vic: r 21.03; WA: O 22 r 2.

² *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 445.

³ ACT: r 1122; FCR: r 5.23; NSW: r 16.7; NT: r 21.03; Qld: r 284; SA: r 229; Tas: r 348; Vic: r 21.03; WA: O 13 r 7 and O 22 r 3. Note that in NSW, the default judgment procedure does not apply to defamation actions.

⁴ B C Cairns *Australian Civil Procedure* (9th ed, Sydney, Lawbook Co, 2011) at [12.220] and [12.240].

⁵ *Ibid*, at [12.10].

recovery of possession of land or goods, even though such claims are not liquidated, no discretion is required. It also follows that equitable remedies are never available.

England and Wales

- [11] A plaintiff may file a request for default judgment by administrative act if the claim is for “a specified amount of money”,⁶ including interest and fixed costs.⁷ The term “specified amount of money” is wider than the former term “liquidated sum”, and covers any case where the claimant puts a figure on the amount of their claim whether it be debt, damages or any other sum.⁸ For example, in a road traffic accident with no ensuing personal injury, the cost of repairs and ancillary claims such as hire-car charges can be claimed as a “specified sum of money” using the default judgment procedure.
- [12] If the claim is for an unspecified amount of money, a default judgment can be entered by administrative act that is final as to liability,⁹ but there will be a disposal hearing later to determine the quantum. At the hearing, the defendant can raise any issue not inconsistent with the liability judgment.¹⁰ I am not sure whether courts adhere to this in practice, though.
- [13] There is also a special rule that allows default judgment for the delivery of goods where the claim form gives the defendant the alternative of paying their value, unless the goods are subject to an agreement regulated by the Consumer Credit Act 1974.¹¹ Special rules also apply to claims against a child or protected party, or claims in tort by one spouse or civil partner against another, or in certain specific cases where service is not assured.¹²

Canada

- [14] I have only looked at the main provinces and territories.
- [15] In summary, while the provinces largely allow default judgment to be given in the registry for liquidated sums, claims for unliquidated sums must be proved in Court. While British Columbia and Quebec make provision for liability judgment for unliquidated sums to be entered by the registrar or clerk, there is no provision for this in Alberta or Ontario.

Federal

- [16] In the federal courts, all undefended actions, whether for liquidated or unliquidated sums, require a motion for judgment and the plaintiff is required to prove their case by affidavit.¹³

Alberta

- [17] A plaintiff may obtain default judgment from the court clerk in a claim for a debt or liquidated demand in money (including interest).¹⁴ An affidavit is required.¹⁵
- [18] If the claim is for an unliquidated sum, the plaintiff must apply to the Court for default judgment.¹⁶ The application is then heard by a judge.
- [19] A special rule also applies to recovery of property — the court clerk may enter default judgment.¹⁷

⁶ Civil Procedure Rules 1998 (UK), r 12.4(1).

⁷ Ibid, rr 12.6 and 45.4.

⁸ The White Book Service *Civil Procedure: Volume 1* (Thomson Reuters, London, 2011) at [12.4.3].

⁹ Civil Procedure Rules 1998 (UK), r 12.4(1)(b).

¹⁰ The White Book Service *Civil Procedure: Volume 1* (Thomson Reuters, London, 2011) at [12.4.4].

¹¹ Ibid.

¹² Civil Procedure Rules 1998 (UK), r 12.10.

¹³ Federal Courts Rules (SOR/981-6), r 210.

¹⁴ Alberta Rules of Court, Alta Reg 124/2010, r 3.36.

¹⁵ Ibid, r 3.39(2).

¹⁶ Ibid, r 3.37.

British Columbia

- [20] A plaintiff may obtain default judgment in the registry for “recovery of money in a specified or ascertainable amount” (including interest).¹⁸
- [21] If the claim is for not for a specified or ascertainable amount of money, the plaintiff may obtain from the registrar judgment for “damages to be assessed”.¹⁹ The application for the assessment of damages is then heard by the court — either at trial or on the papers.²⁰

Ontario

- [22] A plaintiff may obtain default judgment from the registrar in a claim for a debt or liquidated demand in money (including interest).²¹ No affidavit is required.
- [23] If the claim is for an unliquidated sum, the plaintiff may move before a judge for judgment against a defendant. Damages must be proved, usually by way of affidavit.²²
- [24] Special rules also apply for the recovery of possession of land or personal property, and for the foreclosure, sale or redemption of a mortgage.²³

Quebec

- [25] A plaintiff may obtain a default judgment from the special clerk for claims for “a sum of money” which are founded on deed or contract or a detailed account pertaining to the sale price of a movable that has been delivered or the price of a contract for services that have been provided.²⁴ An affidavit is required.
- [26] If a claim is not for a sum of money falling within r 194, the claim can be inscribed for “proof and hearing” before the clerk (with exceptions for certain family matters).²⁵

¹⁷ Ibid, r 3.38.

¹⁸ Supreme Court Civil Rules 2011, r 3-8(3).

¹⁹ Ibid, r 3-8(5).

²⁰ Ibid, r 3-8(12) and (13).

²¹ Ontario Rules of Civil Procedure, RRO 1990, reg 194, r 19.04.

²² Ibid, r 19.05.

²³ Ibid, r 19.04.

²⁴ Code of Civil Procedure, RSQ, c C-25, rr 192 and 194.

²⁵ Ibid, r 195.