IN THE COURT OF APPEAL AT NAIROBI

***(Coram:* Kneller JA, Platt & Gachuhi Ag JJA)**

CIVIL APPEAL NO 31 OF 1984

Between

GURBAKSH SINGH & SONS LIMITED.....APPELLANT

AND

NJIRI EMPORIUM LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Aganyanya J)

JUDGMENT

December 17, 1985, **Kneller JA** delivered the following Judgment.

Gurbaksh Singh and Sons Limited (the landlord) under an agreement in writing made on August 30, 1977 let a house at Lavington to Njiri Emporium Limited (the tenant) for fifteen months from September 13, 1977 to December 14, 1980 at a rent of Kshs 8,000 a month. Rent was to be paid in multiples of Kshs 24,000 quarterly in advance in the middle of every third month beginning on September 15, 1977.

The lease was to be prepared by the landlord's advocate and was to include, among other things, an option to renew the lease for two years at Kshs 15,000 a month payable in multiples of Kshs 45,000 a quarter. The draft lease was never approved but the tenant regularly paid the rent and the landlord accepted it.

The tenant left the premises at the end of April 1980 without giving a quarter's notice or paying in lieu a quarter's rent. The tenant according to the draft lease covenanted to keep the house, its surroundings, garden and pathways in good order, repaint the premises at the end of the tenancy and make good any damage caused to them. These were also implied obligations of the tenant under the Transfer of Property Act.

On June 6, 1980 the tenant entered into an agreement with the landlord to hand over the premises to Afro-trades Limited on July 1 that year in good repair, re-decorated internally and with the surrounding gardens and pathways in good order just as everything was when the tenant went into possession.

The Landlord by its plaint filed in the High Court on July 1, 1983 alleged the tenant failed to do all this by July 1,1980 or ever. The deteriorations and dilapidations to the house and the garden were set out in the surveyor's report and the master gardener's report which were annexed to the plaint. The cost of putting the house and the gardens into their proper condition amounted to Kshs 28,925 and Kshs 15,140.90 and invoices for these were filed with the plaint. There were sundry extras and fees for the reports included in

that sum.

So the landlord asked for judgment for these sums and costs and interest.

The tenant's defence on July 25, 1983 admitted the tenancy but otherwise denied every other averment. The tenant claimed the lease was surrendered by agreement. The covenants relating to the redecorations of the house and to the upkeep of the garden were not set out in full in the plaint. There was an obligation on the tenant, for example, to repaint only the inside of the premises. Annexing reports from the surveyor and the master gardener were contrary to Order 6 rule 3(1) of the Civil Procedure Rules for these were matters of evidence and they should be struck out. The tenant went on to plead that it had complied with the covenants relating to the premises and garden or, in the alternative, the landlord having taken back the house and garden must have done so because they were in good order. The landlord, continued, the tenant, through two of its directors inspected the premises and were satisfied the tenant was leaving everything just as they should be left. Estoppel was also pleaded. So was waiver. Finally, the tenant denied liability and insisted that it had no obligation to pay the landlord anything because the landlord suffered no loss or damage. The tenant asked for the landlord's suit to be dismissed with costs.

There was no reply to all this. The landlord preferred to take out a motion on notice on August 5, 1983 asking for something he called a 'final summary judgment'. His reasons for doing so were revealed in the affidavits of Gurbaksh Singh's son, Ajit, Levitan, the surveyor, Robson, a landscape gardener (rather engagingly called a master gardener in the pleadings) and Sihra, a director of the company known as Modern Building Renovators.

Ajit Singh, deponed to the tenancy, its cessation, the disorder in the house and surroundings left by the tenant. Levitan dealt with his inspection of both, his written report of July 8, 1980 and his fees which the landlord had paid. Robson did the same for the gardens four days later and was duly paid his fees, and all that is in his affidavit. Sihra followed on July 19 and his estimate for the repairs to the house, the details of the work done and the payments made were catalogued in his affidavit. Each said the fees and charges were reasonable for all they necessarily did. Shah, a director of the tenant, by an affidavit of October 4, 1983 denied the truth of Ajit's affidavit and rather sweepingly described those of Levitan, Robson and Sihra as irrelevant.

Ajit in a second affidavit countered Shah's version of these matters.

The motion came on for hearing before Mr Justice Aganyanya on October 18, 1983 when the tenant's advocate, Mr Rasik Patel, despite Mr Khanna's opposition, persuaded the learned judge to deal with his tenant's preliminary objection which was that the landlord's demand (in the plaint) was not a 'liquidated' one which, after hearing their submissions, was adjourned for ruling on October 25 and then upheld.

The landlords application for summary judgment was dismissed with costs which, under the provisions of Order 35 rule 8(2) of the Rules, were ordered to be paid forthwith. Leave to appeal was granted and the submissions in this court were spread over part of each of two days in mid-October this year.

The landlord's prayers are that its appeal be allowed with costs, the High Court ruling and orders on the preliminary objection, motion and their costs be reversed and the motion be returned to the High Court to hear and determine soon. The tenant beseeched this court to do none of this but, instead, to dismiss the appeal with costs.

The issue for this court is whether or not the learned judge erred in law when he held the landlord's claims were not liquidated? It was for the landlord's advocate to persuade us that the judge did so.

It should be recalled that the claims were for the landlord's expenses incurred in remedying the tenant's breaches of covenants to restore the house and the gardens to the state each was in when the tenant entered into possession of them. According to the plaint these sums were Kshs 28,925 and Kshs 15,140.90. This was denied in the defence and these were said to be nothing at all or something very much less.

Summary judgment for a plaintiff may be granted under Order 35 rule 1(1)(a) for, *inter alia*, a debt or liquidated demand with or without interest unless the defendant shows he should have leave to defend the suit Order 35 rule 2(1).

So, were these liquidated demands?

Mr Justice Aganyanya in his ruling, having summarized the pleadings and affidavits, wrote:

> "According to counsel for the respondent summary judgment can only be entered where the amount has been precisely determined [or is] a specific amount due and payable under or by virtue of contract. The amount should have been already ascertained or capable of being ascertained as a matter of mere arithmetic. But where the sum specified is subject to the court's investigation beyond mere arithmetic then it is not a debt or a liquidated demand. He refers to [the] Annual Practice 1964 part 1 page 55 and *Halsbury's Laws of England*, 4th edition, volume 12 at paragraphs 1109 – 1200.
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> On the part of the applicant its counsel insists that the amount claimed in this suit is a liquidated demand because the same is quantified and refers the court to the Court of Appeal Civil Appeal No 31 of 1980.
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> I must say at the outset that this is an unusual application where there has been a defence to a claim by the respondent, a defence which raises grounds of objection to the demand on the face of it, a defence which gives facts that would entitle respondent to an unconditional leave to defend the suit and yet there is an application for summary judgment! Summary procedure is only applied in a few clear cases where the defendant has clearly no defence to a particular claim. I am not sure how the amount claimed in Civil Appeal No 31 of 1980 was arrived at but I am of the opinion that final summary procedure should only be applied where the amount claimed has been specified; is due and payable or has already been ascertained or is capable of being ascertained as a mere matter of arithmetic as respondent's counsel contends. If I peruse and compare the claim and the defence filed herein, I am left in no doubt that the court will have to investigate the terms and conditions of the tenancy agreement entered into by the parties to this suit regarding house No 209/7782 Nairobi. Court will also certainly investigate how Charles Levitan, R B Robson and Sadhu Sihra arrived at the amounts which gives rise to the claim in the plaint apart from determining correctness of such figures in consideration with expected respondent's objection to them. In that case therefore, one cannot say with certainty that the amount in the plaint has been specified or ascertained to warrant procedure being applied.
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> The plaintiff was aware of the detailed defence filed herein before filing this application, and would have no reason to doubt that the issues raised would require a full trial for their proper determination! I am afraid this is not a proper case where summary procedure should be applied in view of the detailed defence filed by the respondent. And though the amount claimed may be quantified the respondent's objection to it is imminent and court cannot ignore defence filed to proceed with the case by way of summary procedure. All these the applicant ought to have been aware of before making the present application."

The landlord's memorandum of appeal includes these grounds. Mr Justice Aganyanya did not confine himself to the preliminary objection or decide it. He misread and failed to apply the ruling of Law JA in *Kenya Flamingo Airways Limited v Eric Snowball and Peter Thorneycroft Trading as ESE Hire* Civil Appeal Application 31 of 1980 of September 19, 1980 which was based on *Baker v Barclays Bank* [1956] 1 WLR 1409, (CA). He erred in law in taking into account the tenant's written statement of defence.

Mr Khanna in his submissions provided the necessary background history of the parties, the action and its history to those grounds.

The tenant's advocate in this court was Mr Nowrojee whose submissions, adequately summarized, I trust, were these. He was of the view the issue was a novel one. Mr Justice Aganyanya was right when he

declared:

> "... summary procedure should only be applied where the amount claimed has been specified, is due or payable or has already been ascertained as a mere matter of arithmetic..."

This was the test set out in the commentary on Order 6 rule 2 in *The Annual Practice*, [1964] volume 1 page 55.

A sum does not become a liquidated one, Mr Nowrojee maintained, just because it is claimed but only if it is agreed, or events on which it is based reveal it can be calculated independently of the sum claimed. An amount that is stolen by a clerk, fraudulently converted by a director, doctor's fees or those of real estate agents were liquidated demands. There is no need for further inquiry as to how much ought to be claimed. If they cannot be worked out under or within the terms of the contract (ie they are not specified in it) then they are unliquidated.

Mr Khanna and Mr Nowrojee referred to several authorities which in chronological order yielded the following guidance to the law on what is and what is not a liquidated demand.

An action for a liquidated demand is different from one for damages. The Common Law Procedure Act 1852 (19 & 20 Vic C 108) by section 26 provided that where the claim was for a debt or a liquidated demand in money arising upon a contract the plaintiff was at liberty to make a special indorsement of the particulars of his claim upon the writ. The Judicature Acts retained the specifically indorsed writ, extended the remedies in it and by Order 11 rule 1 provided that every action in the High Court was to begin by writ with an indorsement stating the nature of the claim made. The forms of indorsement in the Appendix showed the amount was not to be specified in claims for damages but it was to be mentioned in those for money claims. *Knight v Abbott, Page & Co* [1882 – 83],10 QBD 11, 12 Field & Stephen JJ. Farwell LJ in *Lagos v Grunwaldt,* [1910], 1 KB 41, 48 (CA) which was a claim for a sum for professional fees or charges, declared that though it was not a debt or liquidated demand arising under a contract:

> "... It is a claim on contract for quantum meruit. In my opinion that is within the rule. I think the words "debt or liquidated demand" point to the old division of common law actions to be found in *Bullen and Leake*, 2nd edition page 28. The old *indebitatus* counts which have from time to time been rendered more and more concise are designated with little difference of meaning by the terms *indebitatus* counts, money counts or common counts; the expression common counts or common *indebitatus* counts being often used to designate those of most frequent recurrence, viz where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularize those for money lent, money paid, and money received.
>
> The most appropriate name seems to be *indebitatus* counts. And the learned authors go on to say, "there were also formerly in use counts known as *quantum meruit* and *quantum valebat* counts, which were adopted where there was no fixed price for work done or goods sold etc. These counts, however have fallen into disuse, and have been superseded by the general application of the *indebitatus* counts." In my opinion that is the true view; everything that could be sued for under these counts comes within the description of debt or liquidated demand."

An Eldoret subordinate court civil suit claim for Kshs 194 for "making and burning 11,800 bricks at defendant's own request at Sergoit" (during August to October 1950) was held on appeal to be a "liquidated demand" by Windham J in *Ecksteen v Kutosi s/o Bukua* [1951], 24 KLR 90, 91 for, reasonably construed, the plaint stated the amount demanded and gave sufficient particulars of the contract to disclose its nature.

A specified sum of money, the property of the plaintiff, alleged to have been fraudulently converted by a defendant, as a matter of common sense and of law was held by the Court of Appeal in England to be a liquidated demand within the meaning of the phrase in 1956 in the Rules of Supreme Court Order 13 rule 3 which referred to writs of summons indorsed for liquidated demands though founded on the tort of

conversion. It was submitted for the defendants:

> "... that though, in the classic phrase the plaintiffs might "godlike, have waived the tort " and sued for money had and received they did not do so; and consequently, their proper relief was by way of damages. Further, although the sum claimed as damages might be for all practical purposes, absolutely certain, nevertheless the claim was not one for a liquidated demand within the rule, but remained a claim for damages for which, in default of appearance, the remedy was an inter locutory judgment, with an inquiry as to the amount of damages."

And, in all, it was not right to give to that phrase too narrow and technical a significance. *Baker v Barclays Bank Ltd & Others* [1956] 1 WLR 1409, 1411 (CA).

The claim in *Mwatsahu v Maro*, [1967] EA 42 (K) caused some anxiety to Harris J in Mombasa. The defendant purported to sell to the plaintiff a motor car to which he had no title and the plaintiff purchased spare parts for it and put them in it so that it became roadworthy. Later the plaintiff had to hand it back to its rightful owner and so he claimed from the defendant the sums he spent on buying it, the spare parts and his labour. The amount was calculated and could be vouched for by the plaintiff. The authorities seemed to the judge not to be free from some element of doubt. It was stated in the Annual Practice 1953 that "liquidated damages" were within the term "liquidated demand" if they were recoverable either as a specified sum (or money at a specified rate) agreed to be paid as damages in a certain eventuality or as money recoverable under statute as damages such as, for example, interest on a bill of exchange. This was not repeated in the 1966 edition but replaced by the statement that a "liquidated demand" is "in the nature of a debt, ie a specific sum of money due and payable under or by virtue of a contract" which is ascertained already or capable of being worked out as a mere matter of arithmetic. The judge decided, however, that whatever the precise meaning of "liquidated amount" was, the plaintiff's claim before him was not one for it was one for pecuniary damages for breach of warranty of title.

But, with the greatest of respect to the great learning and vast experience of the judge, I am inclined to doubt that he was right in that finding. But it has not been argued in full and it is not an issue in this appeal.

Law JA held that a claim by two men, trading as ESE Hire, against Kenya Flamingo Airways Limited for Kshs 273,108.80 in respect of the alleged wrongful seizure of their goods at the airport was a liquidated demand though it was a quantified one for damages for the tort of conversion and not one that arose out of a claim in contract or quasi-contract. He was dealing with an application to a single judge of this court by the Airways for the time to file a further appeal to be extended when the first was incompetent. *Kenya Flamingo Airways Limited v Eric Snowball and Peter Thorneycroft t/a ESE Hire*, CA Civil Application 31 of 1980. He pointed out it was in accordance with the highly persuasive authority of *Baker v Barclays Bank*, (*ibid*).

This court has had no difficulty in treating as "liquidated demands" with the term in Order 35 rule 1(a) claims for mesne profits of an exact sum each month calculated by reference to its contemporary rental value founded on a report and affidavit of the valuer Levitan. *Gohil & Nandha v Wamai* CA Civil Appeal 42 of 1982 Nairobi, March 31 1983; *Heptulla v Noormohamed* CA Civil Appeal 62 of 1983 Nairobi April 5, 1984.

The High Court did the same in *Gilani v Nyanza Supermarket Limited, Nairobi* High Court Civil Case 655 of 1983, Simpson CJ, as late as July 12, 1985.

Going back now to the issue in this appeal it is apparent, with respect, that Mr Justice Aganyanya erred in law when he held the landlord's claim was not a "liquidated demand" within that term in Order 35 rule 1(a).

The demands were for specified sums, exact ones, quantified ones. They embraced goods sold and delivered to the place, the work done with them there and the fees of the experts.

Mr Khanna asked if separate claims against the tenant by these experts (had their contract been with it) would be liquidated demands? The answer would be 'yes'.

Whether or not they were agreed prices, charges or fees excessive or provable were irrelevant to the preliminary objection. And so was the complaint that the landlord should not tack the experts' invoices statements and receipts to the plaint. The contents of the written statement of defence did not affect the issue of whether or not the claims were liquidated demands.

The result is that in my view the appeal should be allowed with costs, the ruling of the learned judge reversed, the tenant's preliminary objection over-ruled with costs and the landlord's motion remitted to the High Court to hear with due despatch.

Platt and Gachuhi Ag JJA, agree so these now are the orders of the court.

Platt Ag JA. I agree. As a result of an agreement for a lease, the defendant, who had been occupying the premises on payment of rent, vacated the premises. The plaintiff alleged that the defendant had left the premises in a bad state of repair. As a result the plaintiff alleged that he had incurred expenses in putting the building and the garden back into their original condition, for which the plaintiff held the defendant answerable.

Consequently, the plaintiff prayed for judgment:
a) in the sum of Kshs 28,925 under paragraph 8;
b) Kshs 15,140.90 under paragraph 9 of the plaint;
c) Interest at court rates calculated in various ways.

Under paragraph 8 of the plaint the claim was for redecorating and repairing the house plus sundry extras. The cost was Kshs 27,475 in accordance with the builders' and renovators' quotation attached to the plaint. The sundry extras were Kshs 950 as set out in the invoices also attached to the plaint. A last item was Kshs 500 for the surveyor's report. The total therefore under paragraph 8 was Kshs 28,925.

Under paragraph 9 of the plaint, dilapidations to the garden were put right by a master gardener at a cost of Kshs 15,140.90, in accordance with his invoice.

It will be seen therefore, that in claims (a) and (b) the plaintiff incurred debts for work done and goods supplied, which it thought were caused by the defendant's breach of covenant, or perhaps implied covenant. At present there is no claim in negligence. The situation is that in effect the plaintiff has incurred debts to the persons who have put the building and garden in good repair; and therefore if it were the duty of the defendant to have done this work, the plaintiff seeks to recover what it has spent on doing the work which the defendants ought to have done. The plaintiff has quantified the amount of work and given details of the calculations, more or less, as if the defendant owes these quantified sums to the plaintiff in the nature of a debt. Strictly speaking the defendant has not entered into a contract whereby it owes the sums as a debt proper, but the plaintiff considered that it had made a liquidated demand.

On this basis, the plaintiff took proceedings by motion under Order XXXV rule 1 of the Civil Procedure Rules praying for summary judgment in the total sum of Kshs 44,065.90 under paragraphs 8 and 9 of the plaint together with interest.

At the hearing of the motion a preliminary point was taken that the motion was misconceived in law, in that Kshs 44,065.90 was not a debt or liquidated demand under Order XXXV rule 1 of the Civil Procedure Rules. Consequently the motion of summary judgment must fail. The learned judge having considered the objection held that the claims were not liquidated demands and dismissed the application with costs. The plaintiff/ applicant now appeals on this specific point.

It is important to note that this motion has not been heard, and should this appeal be allowed, the High Court will then have to hear and determine all the remaining issues which arise under it. In the course of his judgment the learned judge appears to have taken into account a number of matters which lay outside

the preliminary objection. It should be said therefore, that as far as this appeal is concerned, the only facts relevant are those in the claims of the plaintiff and the documents supporting them in the plaint and nothing else. That is so because the objector is saying, that even if all that is in the plaint is conceded, his claim will still not lie in law. So the learned judge had to ask himself whether in those circumstances, the claims of the plaintiff were or were not liquidated demands.

Kneller JA has set out the history of the evolution of the concept of liquidated demand. I do not propose to repeat what has been said except to acknowledge my debt to Farwell, LJ, who explained how debt or liquidated demand arose historically, in *Lagos v Grunwaldt* [1910] 1 KB 41 at page 48. One starts with a debt for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest and accounts stated. Then there were claims on *quantum meruit* and *quantum valebat* which concerned cases where no price for work done or goods sold had been fixed; but a reasonable price was still a liquidated demand. In the *Lagos* case, a claim for a sum for professional fees or charges was declared to be a debt or liquidated demand on that basis. Approval of Farwell LJ's judgment will be found in the later cases noted in the *Supreme Court Practice*, "the Centenary" edition Vol 1 at page 43. From all these examples it is easy to see that a debt was a sum of money owed and a liquidated demand grew out of what was clearly a trading debt, as a result of performing a contract. Because of the circumstances of the contract, a specific sum was involved, or one which could be ascertained as a matter of arithmetic, or a calculation based on reasonable prices. By way of contrast, it was said that if the ascertainment of the sum required investigation beyond mere calculation, then the sum claimed was not a debt or liquidated demand, but constituted damages at large.

But this was perilously near claims under *quantum meruit* and *quantum valebat* when no prices were fixed; resort had to be made to reasonable standards, and I dare say on occasions there might have to be some investigation of what those standards were. Yet it was permissible to claim reasonable sums, according to the plaintiff's notions, and leave the defendant to challenge them in defence. This ambivalence seems to have spread over into the area of liquidated damages where so long as the pre-estimate of damage was genuine, claims under the pre-estimate would be accepted as liquidated demands, but would not be so accepted if the pre-estimate was really a penalty. Finally, a specific figure given by the plaintiff could not be accepted when his claim lay in general damages. The learned judge took all this learning into account by directing himself in accordance with the commentaries in the Annual Practice 1964. The 1982 Rules are more or less similar as to the essence of a liquidated demand, namely a demand in the nature of a debt. But the concept has broadened in recent years and embraces certain claims in tort.

The learned judge was referred to *Kenya Flamingo Airways Ltd v Eric Snowball & Others* a Civil Application to this court No 31 of 1980, decided by Sir Eric Law JA as a single judge. Unfortunately, the proceedings against which the appeal was to be presented, if allowed out of time, were not put before Aganyanya J. Otherwise, the interesting opinion of Harris J, refusing to set aside an e*x parte* judgment given in default, would have illustrated the development in claims in tort, set in motion by *Baker v Barclays Bank* [1956] 1 WLR 1409. Law JA, in effect upheld Harris, J in the *Flamingo Airways* case, and thus sanctioned the following development.

In *Baker's* case, Lord Evershed entertained a broad view of the idea of a liquidated demand. But the situation was very simple. A certain sum of money had been withheld by a bank. He says it was:

> "a claim to recover the sum of £10,648 exactly, that being, as a writ alleges, the plaintiff's money or property which had been fraudulently converted by the third defendants."

In a broad way, a specific sum of money detained or converted in tort, is rather similar in effect to money being owed and not repaid. Especially as the defendants were bankers, the relation of contract and tort to a sum not paid to the customer is close; and as the sum is specific, it is not difficult to see that the phrase, a liquidated sum in the nature of a debt, could easily be applied.

In a wider context, the proposition still holds good. Special damages arising out of tort for specific and direct loss may well be liquidated demands. The pre-accident value of damaged property, is an example. But what is the position if the damage is one stage removed, so that the injured person must put right the

damage to himself or his property, and then reclaim that sum?

In the *Flamingo Airways* case, the plaintiff did not seek the return of its property; it sought the replacement value of some goods, and the hire of other goods in order to perform a contract with a third party. Harris J and Law JA said that such items were liquidated demands. If that be so, then that proposition must govern the present claims. The defendant failed to repair the house and keep up the garden. The plaintiff now sues the defendant for the return of the money spent. The plaintiff says the defendant owes him the amount that the plaintiff has spent, to cure the fault of the defendant.

Looking broadly at the essence of this situation, if a plaintiff is injured by negligent driving, are not the hospital payments liquidated sums, so long as they are specifically quantified; the towing charges; and the repair charges to the vehicle?

It seems to me therefore that the extension in the *Flamingo Airways* case is a satisfactory extension of the principle and covers the present case. I would allow the appeal and I agree with the orders proposed by Kneller JA.

Gachuhi Ag JA. I have read in draft form the judgments by Kneller JA, and Platt Ag JA with which I am in agreement.

The claim being a liquidated demand as set out in the notice of motion, the defendant was at liberty, as provided by rule 2 of the same order to show that it should have leave to defend the suit rather than raising the preliminary objection.

Dated and delivered at Nairobi this 17th day of December, 1985.

A.A KNELLER

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JUDGE OF APPEAL

H.G PLATT

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AG. JUDGE OF APPEAL

J.M GACHUHI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR