COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2010/016

BETWEEN:

MICHAEL LAUDAT
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF DOMINICA

Applicants/Defendants/
Intended Appellants

and

DANNY AMBO

Respondent/Claimant

Before:

The Hon. Mr. Hugh Rawlins — Chief Justice
The Hon. Mde. Ola-Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal

Mrs. Wynante Adrien-Roberts, Solicitor General and
Ms. Sherma Dalrymple for the Applicants/Defendants/Intended Appellants
Mrs. Dawn Yearwood-Stewart for Respondent/Claimant

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2010: November 8,
December 15.

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Civil Appeal - leave to appeal against order of a Master - assessment of damages after default judgment entered - assessment of damages after admission of liability on claim for unspecified sum - can a defendant against whom a default judgment has been granted appeal the order of the Master made at an assessment hearing - Civil Procedure Rules 2000 Rules 12.10*, 12.13, 14.1, 14.8, 16.2, 16.3, 16.4, English Civil Procedure Rules Practice Direction 26.*

The respondent obtained default judgment against the applicants for their failure to contest the respondent's statement of case for false imprisonment and malicious prosecution. The claim arose after the charges against the respondent for murder and conspiracy to murder were dismissed a year later for the failure of the prosecution to offer evidence against the respondent. The respondent claimed special damages of $40,000.00 for the cost of his

defence, and $140.00 for cost of transportation to attend court for 7days at the rate of $20.00 each day. The respondent also claimed damages including aggravated and exemplary damages for malicious prosecution and false imprisonment, interest and costs. The default judgment was not worded in the terms of CPR 12.10 (1)(b) neither did it speak specifically to the basis on which the request for judgment was made in accordance with CPR 12.4 and 12.5. The respondent filed an application for assessment of damages, at which hearing the Master ordered that the claimant file evidence on affidavit together with supporting documents, authorities and brief submissions in respect of the assessment and adjourned to a later date for the assessment hearing to take place. On the adjourned date the Master ordered that the claimant file supplemental evidence and submissions relating to the cause of action for false imprisonment by a certain date, and adjourned once again to a later date. The applicant has appealed on the ground that by allowing the respondent to file supplemental evidence and submissions to plead the cause of action of false imprisonment, the Master erred as there was no application before the court.

Held: granting leave to appeal, treating the application for leave to appeal as the appeal, and allowing the appeal, setting aside the order of the Master made on 23rd September 2010 and remitting the matter to the court below for damages to be assessed with no order as to costs:

1. At an assessment of damages hearing the court is not required to go behind the default judgment order and enquire into matters of liability because the defendant by failing to file an acknowledgment of service and/or defence is taken to admit liability as pleaded. The only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of general damages and any special damages claimed. Generally the claimant would not be entitled to damages pleaded in the cause of action if not proven by evidence.

2. A claimant's failure to prove damages under a pleaded head of claim in the evidence adduced is not a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages. Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously, and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.

3. A defendant against whom a default judgment has been entered would not be prevented from appealing an interlocutory order made at an assessment hearing despite the provisions of CPR 12.13.

Ex p. Davis (1872) L.R. 7 Ch. App 526 applied

JUDGMENT

[1] EDWARDS J.A.: This is an Application for Leave to Appeal against the order of the learned Master made on the 23rd September 2010 which was the hearing date for the assessment of damages following the default judgment entered against the applicants. The Master ordered on this date that the claimant file supplemental evidence and submissions by the 12th November 2010 and adjourned the assessment to the 24th November 2010 instead of assessing the compensatory damages that the claimant was entitled to.

Background Facts

[2] The respondent Mr. Danny Ambo had previously on the 26th March 2010 obtained default judgment against the applicants for their failure to contest the respondent's statement of case for false imprisonment and malicious prosecution. The claim arose because the respondent was arrested and charged for murder and conspiracy to murder on the 23rd April 2007. He had remained in custody from the 23rd April 2007 up until the 23rd July 2007 when the High Court granted him bail. Following several appearances at the Roseau Magistrate's Court, on the 15th April 2008 the prosecution offered no evidence against the respondent and the charges were dismissed.

[3] The respondent in his statement of claim filed on the 3rd February 2010 claimed special damages of $40,000.00 for the cost of his defence and $140.00 for cost of transportation to attend court for 7 days at the rate of $20.00 each day. The respondent also claimed damages including aggravated and exemplary damages for malicious prosecution and false imprisonment, interest at the statutory rate of interest and costs.

[4] CPR 12.10(1)(b) states that: "Default judgment on a claim for -- (b) an unspecified sum of money -- must be judgment for the payment of an amount to be decided by the court." The note to this rule states: "*Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under this paragraph."

[5] The default judgment in the instant case was not in the terms of CPR 12.10 (1)(b). It stated: ."You have not replied to the Claim Form. It is therefore ordered that you pay to the Claimant damages to be assessed and costs." The Registrar of the High Court and legal practitioners are reminded that the default judgment wording ought to be guided by the terms of CPR 12.10, depending of course on the nature of the claim. I will give further consideration to CPR 12.10(1)(b) later.

[6] The default judgment should also speak specifically as to whether it is being entered because an acknowledgment of service and/or a defence has not been filed where that is the basis on which the request for judgment has been made.[1]

[7] The respondent, on the 7th June 2010 filed a Notice of Application for Assessment of damages pursuant to Part 16 of CPR 2000. The supporting affidavit of Mr. Danny Ambo stated that he was in a position to prove the amount of damages to be awarded to him. It is necessary to set out the relevant rules which govern an assessment of damages where a hearing to assess damages is fixed. CPR 16.2, 16.3 and 16.4 state as follows:

> "Assessment of damages after default judgment
>
> 16.2(1) An application for a default judgment to be entered under rule 12.10(1)(b) must state –
>
> (a) whether the claimant is in a position to prove the amount of the damages; and, if so;
> (b) the claimant's estimate of the time required to deal with the assessment; or
> (c) that the claimant is not yet in a position to prove the amount of the damages.
>
> (2) Unless the application states that the claimant is not in a position to prove the amount of damages, the court office must fix a date for the assessment of damages and give the claimant at least 14 days notice of the date, time and place fixed for the hearing.
>
> (3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

[1] See CPR 12.4 and 12.5

(4) The court office must then fix a period within which the assessment of damages will take place and a date on which a listing questionnaire is to be sent to the claimant."

"Assessment of damages after admission of liability on claim for unspecified sum of money

16.3(1) This rule applies where the defendant has admitted liability for the whole or a specified proportion of a claim for an unspecified sum of money.

(2) An application for judgment to be entered for damages to be assessed on an admission under Part 14 must –

(a) state whether the claimant is in a position to prove the amount of damages; and, if so

(b) give an estimate of the time required to deal with the assessment; or

(c) state that the claimant is not yet in a position to prove the amount of damages.

(3) Unless the application states that the claimant is not in a position to prove the amount of damages, the court office must fix a date for the assessment of damages and give the parties at least 14 days notice of the date, time and place fixed for the hearing.

(4) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(5) The court office must then fix either –

(a) a case management conference and give notice to the parties; or

(b) a period within which the assessment of damages will take place and a date on which a listing questionnaire is to be sent to the claimant.

(6) The defendant is entitled to cross examine any witness called on behalf of the claimant and to make submissions to the court but is not entitled to call any evidence unless the defendant has filed a defence setting out the facts the defendant seeks to prove.

(7) The court must also deal with any request under Part 14 for time to pay."

"Assessment of damages after direction for trial of issue of quantum

16.4 (1) This rule applies where the court makes a direction for the trial of an issue of quantum.

"(2) The direction may be given at –
(a) a case management conference;
(b) the hearing of an application for summary judgment; or
(c) the trial of the claim or of an issue, including the issue of liability.

(3) On making such a direction the court must exercise the powers of a case management conference and in particular may give directions about –

(a) disclosure under Part 28;
(b) service of witness statements under Part 29; and
(c) service of expert reports under Part 32.

(4) The court must also fix –
(a) a date on which the court office is to send a listing questionnaire to the parties; and
(b) a period within which the assessment of damages is to commence."

[8] On the 14th July 2010 the learned Master made the following order upon the respondent's application dated 7th June 2010 coming on for hearing --

"UPON THIS MATTER coming up for assessment of damages.
AND UPON HEARING Mrs. Dawn Yearwood-Stewart of Dawn Yearwood Chambers of Counsel for the Claimant and Ms Sherma Dalrymple of the Attorney General Chambers of Counsel for the First and Second Defendants.

IT IS ORDERED that:
(a) claimant to file evidence on affidavit together with supporting document and authorities and brief submissions in respect of the assessment.
(b) assessment shall take place on 23rd September 2010."

[9] At the assessment of damages hearing on the 23rd September 2010, the Master apparently had before her the evidence of Mr. Ambo and the submissions of his counsel which were filed as a consequence of the order made on the 14th July, 2010. Instead of proceeding to assess the damages in accordance with the procedure envisaged by CPR 16.3(6), the Master ordered that:

"1. The Claimant is to file supplemental evidence and submissions by the 12th November 2010.
2. Matter adjourned for assessment on 24th November 2010 at 10:30am."

The Application for Leave to Appeal

[10] The Applicant did not comply with PD 3(a) Practice Direction No. 3 of 2008 which requires that an applicant file and serve along with his notice of application his skeleton arguments. The grounds of the application state that:

> "1. The Honourable Master… [acted] in excess of her jurisdiction by giving the Respondent/Claimant leave to file supplemental evidence and submissions by the 14th day of November with there being no applications before the master.
> 2. The applicants have a realistic chance of success on appeal."

[11] The grounds of the proposed appeal are:

> "1. The … Master erred in law by allowing the Respondent/Claimant to file supplemental evidence and submissions to sufficiently plead the cause of action of false imprisonment when there was no application before the Court. At this point the learned master's only course would have been to strike out the claim for false imprisonment and proceed with an assessment of damages.
> 2. By ordering the Respondent/Claimant to file additional evidence and submissions the learned Master in effect made representations on behalf of the Respondent/Claimant."

[12] The respondent filed an Affidavit in Opposition to the Application for leave to appeal on the 15th October, 2010, and like the applicants, failed to file his skeleton arguments in compliance with the PD 3(c) of Practice Direction No. 3 of 2008.

[13] Counsel for the applicants attempted to make amends by filing on the morning of the 8th November 2010 at 9:30 am, an application to extend the time for filing submissions, relief from sanctions, and exhibiting the omitted submissions, with a request that the submissions be deemed to have been validly filed. We saw this application only after Mrs. Adrien-Roberts informed the court that the application was filed. She explained about the shortage of experienced counsel existing in the Attorney General's Chambers. That and other administrative problems had resulted in her inability to have documents served in a timely manner, and non compliance with the Practice Direction and Rules, she said. While we understand that such problems may very often cause non compliance with the Rules, the court has to be evenhanded in enforcing compliance with the Rules. Counsel for the

respondent was unaware of this application and the existence of the applicant's submissions. We decided not to entertain this late application; and since both counsel were in breach of a Practice Direction which does not provide a sanction we took the view that the overriding objective dictated that we should hear both counsel on the merits of the application for leave to appeal.

[14] Before dealing with the submissions of counsel, we wish to express in writing our profound displeasure concerning the manner in which legal practitioners prepare for Court of Appeal sittings in Dominica and most of our other jurisdictions. Submissions, authorities and documents which should have been filed, served and transmitted to the Court of Appeal in Saint Lucia for us to read before we arrive in the State for a sitting, are far too frequently handed up to us while we are hearing the matter, in breach of the Rules and Practice Directions. Consequently, it has become increasingly difficult for the judges of the Court to read and prepare for sittings in a timely manner, particularly where there has been a significant increase in the number of matters listed for sittings in most of the islands. This practice has resulted in sleepless nights during the sitting, and intolerable stress for the judges of the court, which naturally have adverse health consequences. Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law,[2] mistake of the law by counsel[3]; lack of diligence, volume of work, difficulty in communicating with

[2] See Richard Frederick and Owen Joseph and others. St Lucia Civ App No. 32 of 2005 (unreported) 16/10/06;
Pendragon International Limited and others v Bacardi International Limited, Anguilla Civ App No. 3 of 2007 (Unreported) 23/11/07
[3] See Donald F. Conway and Queensway Trustees, St Christopher and Nevis Civ App No. 11 of 1999 (Unreported) 3/4/2000

client,[4] pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence[5] or inadvertence.[6]

The Submissions

[15] Learned counsel for the applicants submitted that the options available to the Master were to either award damages as proved in accordance with legal principles, or refuse to make an award of damages if she found that damages for false imprisonment were not proven on the evidence before her. Mrs. Adrien-Roberts submitted that the Master fell into error where in the absence of any application from the respondent, she proceeded to make the order that she did. Though CPR 26.2 permitted the learned Master to make an order of her own initiative, the Master did not apply the procedure prescribed in that rule, and in any event the Master was not permitted to apply that rule in an assessment of damages since the matter had gone past case management. She submitted further that the applicants were prejudiced by the order since the order could result in a larger award of damages without any reference to the applicants. CPR 26.2 states:

> "Court's power to make orders of its own initiative
>
> 26.2(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.
>
> (3) The opportunity may be to make representations orally, in writing telephonically or by any other means as the court considers reasonable.

[4] See John Cecil Rose and Anne Marie Rose. Saint Lucia Civ App No. 19 of 2003 (Unreported) 22/9/2003
[5] See Mills v John, OECS Law Reports Vol.3 page 597 Per Liverpool JA; Vena McDougal and Reno Romain, Commonwealth of Dominica HCVAP 2008/003 (Unreported) 7/4/08;
[6] Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited, Grenada Civ. App No. 11 of 2010 : (Unreported) 5/5/10

(4) If the court proposes to –
(a) make an order of its own initiative; and
b) hold a hearing to decide whether to do so;
the court office must give each party likely to be affected by the order at least 7 days' notice of the date, time and place of the hearing."

[16] Learned counsel Mrs. Yearwood-Stewart submitted that the Master had the discretion to request further evidence and submissions from the respondent; and could apply CPR 26.2 to the assessment proceedings, and the Master was not obliged to give the applicants any reasonable opportunity to make representations orally before she made the order, since the assessment of damages hearing arose from a default judgment which excluded the applicants from being heard.

What are the Rights of a Defendant at an Assessment of Damages Hearing where a default judgment has been entered against that Defendant?

[17] There are two schools of thought on this issue which have resulted in inconsistency in applying and interpreting Part 16 of CPR 2000. One school of thought is that a defendant against whom a default judgment is entered is shut out completely from participating in subsequent proceedings up to the point of final judgment after damages have been assessed. The other school of thought interprets CPR 16.3 generously, by applying Rule 16.3(6) to default judgments, thus permitting the defendant to cross examine the witnesses of the claimant, and make submissions at the hearing to assess damages after a default judgment has been entered. A review and analysis of the relevant rules is therefore necessary in deciding whether to grant leave to appeal.

[18] The consequences of failing to file an acknowledgment of service in Form 4 is set out in CPR 9.2(5) which states: "If a defendant fails to file an acknowledgment of service or a defence, judgment may be entered if Part 12 allows it." At the beginning of Form 4 which is the Acknowledgement of Service of Claim Form, a WARNING is stated that: "If this form is not fully completed and returned to the court at the address below within 14/28 days of service of the claim form on you, the claimant will be entitled to apply to have judgment entered against you. If the

claimant does so, you will have no right to be heard by the court except as to costs or the method of paying any judgment unless you apply to set judgment aside."

[19] The consequences of failing to file a defence dealing with the issue of assessment of damages are spelt out in CPR 10.2(4) and (5). "A defendant who admits liability and wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.[7] If a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered if Part 12 allows it."[8]

[20] The defendant's rights following default judgment are the subject of CPR 12.13 which obviously spawned the acknowledgment of service Form 4 WARNING. CPR 12.13 states: "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –

(a) an application under rule 12.10(4);

(b) costs;

(c) enforcement of the judgment; and

(d) the time of payment of any judgment debt."

[21] Rule 12.10 (4) provides that a "Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim." Rule 12.10 (5) states that "An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply." [9]

[22] CPR 16.2 which deals with the assessment of damages after a default judgment excludes the defendant from participating in the process for fixing the trial date for

[7] CPR 10.2 (4)
[8] CPR 10.2 (5)
[9] Rule 11.15 states: "After the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all parties."

the assessment of damages; and CPR 16.2(2) does not require the court office to give the defendant notice of the date fixed for the assessment of damages. This is in contrast to CPR 16. 3(5)(a) which requires notice to be given to the parties where the date is fixed for the assessment of damages after an application for judgment to be entered for damages to be assessed under Part 14. I have already set out the relevant rules under Part 16 at paragraph 7 of this judgment.

[23] Having regard to the heading of Rule 16.3 which is - "Assessment of damages after admission of liability on claim for unspecified sum of money" - it is necessary to consider Part 14 also which stipulates how a party may admit the truth of the whole or any part of a statement of case for the other party. CPR 14.1 (3) states that "A defendant may admit the whole or part of a claim for money by filing an acknowledgement of service containing the admission". A defendant may also admit the truth of the whole or any part of the claimant's statement of case by giving a notice in writing before or after the issue of proceedings.[10] Rule 14.1(4) (c) states that the defendant may admit liability to pay the whole of a claim for an unspecified sum of money in accordance with CPR 14.8.

[24] It is helpful at this juncture to reproduce CPR 14.8 and CPR 12. 10 in their entirety as they put the rules in Part 16 in their proper perspective.

> " Admission of liability to pay whole of claim for unspecified sum of money
>
> 14.8 (1) This rule applies where the –
>
> (a) amount of the claim is not specified;
>
> (b) defendant admits liability in the acknowledgment of service to pay the whole of the claim and does not offer to pay a specified sum of money or proportion of the claim in satisfaction of the claim;
>
> (c) defendant has not requested time to pay under rule 14.9; and
>
> (d) only remedy the claimant seeks is the payment of money.

[10] See: CPR 14.1 (1) and (2)

(2) The claimant may file a request for judgment in Form 7.

(3) The court office must enter judgment in accordance with the request.

(4) Judgment will be for an amount to be decided by the court and costs.

Rule 16.3 deals with how the court decides the amount of the judgment.

Part 65 deals with the quantification of costs." (My emphasis)

"Nature of default judgment

12.10(1) Default judgment on a claim for –

(a) a specified sum of money – must be judgment for payment of that amount or, a part has been paid, the amount certified by the claimant as outstanding -

(i) if 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;

Rule 2.4 defines "a claim for a specified sum of money' and sets out the circumstances under which a claim for the cost of repairing property damaged in a road accident can be treated as such a claim.

Part 65 deals with the quantification of costs. (My emphasis)

(b) an unspecified sum of money – must be judgment for the payment of an amount to be decided by the court;

Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under this paragraph. (My emphasis)

(c) goods – must be –

(i) judgment requiring the defendant either to deliver the goods or pay their value as assessed by the court;

(ii) judgment requiring the defendant to pay the value of the goods as assessed by the court; or

(iii) (if the court gives permission) a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.

(2) An application for permission to enter a default judgment under paragraph (1) (c) (iii) must be supported by evidence on affidavit.

(3) A copy of the application and the evidence under paragraph (2) must be served on the defendant against whom judgment has been sought even though that defendant has failed to file an acknowledgment of service or a defence.

(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply."

[25] This review and analysis of the relevant rules show that there is a connection between Rule 14.8 which deals with an Admission of liability to pay the whole of a claim for an unspecified sum of money and Rule 16.3 which deals with how the court decides the amount of the judgment for an Assessment of damages after admission of liability on a claim for an unspecified sum of money. Noticeably also, Rule 12.10(1)(b) which covers a default judgment entered on a claim for an unspecified sum where the judgment is for an amount to be decided by the court, is also linked with Rule 16.2 which governs the assessment of damages after default. The absence of any link between Rule 12.10(1)(b) and Rule 16.3 significantly demonstrate that the provisions in Rule 16.3 are not to be applied to assessments of damages after default judgment.

[26] The Civil Procedure Rules 2000 reveal a scheme which leads to the ineluctable conclusion that the rules intentionally exclude a defendant against whom a default judgment has been entered on a claim for an unspecified sum from participating in the assessment of damages hearing by cross examining witnesses and making submissions. That defendant would only be heard on the matter of costs at the hearing of an assessment of damages following a default judgment by virtue of CPR 12.13(b). Although Part 16 is silent as to whether a notice of the hearing for the assessment of damages should be served on a defendant against whom a default judgment has been entered it is obvious that notice must be served. That defendant is entitled to be notified of the date set for the assessment of damages so that he/she can attend the hearing and address or make submissions to the court on the question of costs only. Under the English practice 3 days notice is given to the defendant and this practice should be applied under our rules.

Distinguishing the English Practice and Procedure

[27] It is important and must be noted that the procedure in England for determining the quantum of damages following a default judgment or a judgment on admission of liability on a claim for an unspecified sum of money is different. The English CPR 12.7 and the Practice Direction to CPR Part 26 (CPR PD 26)[11] regulate that procedure where a default judgment order has been made.

[28] I note further that while the English CPR rule 10.2 is similar to our CPR 9.2(5), the acknowledgment of service Form N 210 in England does not contain a similar warning as our Form 4[12]. Neither does the English CPR contain a rule similar to our CPR 12.13. Consequently, in Pugh v Cantor Fitzgerald International[13] after the Master refused to set aside a default judgment obtained where the

[11] See The Civil Practice 2007 (The Green Book) Vol 1 at page 315

[12] The Notes in the English Acknowledgment of Service Form state: " If you file an acknowledgment of service but do not file a defence within (28 days) (days) of the date of service of the particulars of claim, and you have not indicated that you intend to contest jurisdiction, judgment may be entered against you."

[13] [2001] EWCA Civ 307 at paras 3,4 and 6

defendant filed an acknowledgment of service but no defence, the Master ruled that "… in the absence of any meritous defense…the judgment in default should be allowed to stand. The defendant will of course have the opportunity of defending the issue of quantum in this matter." The Master gave directions for the defendant to serve a counter schedule to the claimant's schedule of loss. At a subsequent hearing on the 16th February 2000 the Master struck out parts of the defendant's schedule of loss, and that order of the Master gave rise to two appeals.

[29] While the English Rule 14.6 which governs - "Admissions of liability to pay whole of claim for unspecified amount of money" - is comparable to our CPR 14.8; the equivalent of our CPR 16.3 is absent from the English CPR. Instead, the English CPR PD 26 Paragraph 12 regulates the determination of the amount to be paid under a judgment or order obtained by a judgment of default under Part 12, and a judgment on an admissions under Part 14. The English procedure requires that when the court is making the order for default judgment or judgment on admission, the court will give directions listing the claim for a disposal hearing among other directions[14]. PD 26 12.4(5) states "Except where the claim has been allocated to the small claims track, the court will not exercise its power under sub-paragraph (2) (a)[15] unless any written evidence on which the claimant relies has been served on the defendant at least 3 days before the disposal hearing." (My emphasis)

The Assessment Hearing

[30] Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgment of service and/or a defence is taken to admit liability as pleaded. At the

[14] CPR PD 26 paragraph 12.4 (2) states: " At a disposal hearing the court may – (a) decide the amount payable under or in consequence of the relevant order and give judgment for that amount; or (b) give directions as to the future conduct of the proceedings."
[15] Rule 12 .4 (2) of the English CPR states : "At a disposal hearing the court may -- (a) decide the amount payable under or in consequence of the relevant order and give judgment for that amount; or (b) give directions for the future conduct of the proceedings."

assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and general damages. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.

[31] Unlike the English CPR PD 26 paragraph 12.4(2) which gives the court the discretion at the disposal hearing, to decide the amount payable on the default judgment or give directions as to the future conduct of the assessment proceedings, we have no such rule or practice direction under our CPR 2000. A claimant's failure to prove damages under a pleaded head of claim in the evidence adduced is not an error of procedure, or a failure to comply with a rule, practice direction, or court order or a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages. There is obviously a tension between principle and fairness. Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.

Can a Defendant against whom a default judgment has been obtained appeal the order of the Master made at an assessment hearing?

[32] Section 30(1)(b) of The Eastern Caribbean Supreme Court (Dominica) Act Chap. 4:02 ("the Court Act) states that "an appeal shall lie to the Court of Appeal,

and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court…" Section 30(2) (a) to (f) excludes 6 categories of orders from appeal. The Master's order is an interlocutory order which is not excluded from appeal by section 30(2) (a) to (f) of the Supreme Court Act. The order is an interlocutory order under section 30(2) (g) which requires the leave of the Court before the appeal can proceed.

[33] The Rules in CPR 2000 take effect as part of the Supreme Court Act. They have the effect of an Act of Parliament, but must be construed in the spirit of the Court Act. They cannot repeal or contradict the provisions of the Supreme Court Act. If CPR 12.13 and any other relevant rules have a meaning and effect inconsistent with section 30 (1)(b) of the Supreme Court Act, they must be interpreted so as not to be repugnant to section 30(1)(b) of the Supreme Court Act. In Ex p. Davis[16] James L.J. said (with reference to the Bankruptcy Rules 1870): "The Act of Parliament is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act".[17] Consequently, a defendant against whom a default judgment has been entered would not be prevented from appealing an interlocutory order made at an assessment hearing despite the provisions of CPR 12.13.

Conclusion

[34] Returning to the instant case, I am of the view that the applicant has satisfied the criteria for obtaining leave to appeal. I would also treat the application for leave as the appeal in the peculiar circumstances of the case. Having regard to my prior review and analysis of the rules governing default judgments on a claim for an unspecified amount and the assessment of damages after default judgment, I would conclude that the Master erred in making the order dated 23rd September 2010 instead of proceeding to assess damages on the evidence and submissions that were before her.

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[16] (1872) L.R. 7 Ch. App. 526, 529

[17] See also Craies on Statute Law 7th edition at pages 320 to 321

[35] I would allow the appeal, set aside the order of the Master made on the 23rd September 2010 and remit the matter to the court below for damages to be assessed. Considering that the impugned order was made by the Master on her own initiative and not as a result of an application from the respondent I would make no order as to costs.

Ola Mae Edwards
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Janice George-Creque
Justice of Appeal