THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 64 0f 2007

BETWEEN:

	DR. RALPH E. GONSALVES	CLAIMANT
AND		
	MATTHEW THOMAS	FIRST DEFENDANT
AND	BDS LIMITED	SECOND DEFENDANT

Appearances: Mrs. Kay Bacchus Browne for the Applicant/ First Named Defendant, Mr G. Graham Bollers for the Claimant/Respondent and Mr Kezron Walters with him

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2014: June 25
July 17

JUDGMENT

[1] **Henry, J. (Ag.)**: This is an application by the Applicant/First Named Defendant[1] filed on January 15, 2014 for an order setting aside "the summary/judgment dated 16th November 2009 striking out the defence and also for an order to stay the execution of an oral examination made by the Master Actie on 26th November 2013 until the hearing and determination of the said Application". The Defendant swore an affidavit on January 14, 2014 which was filed on January 15, 2014 in support

[1] Referred to herein as "the Defendant"

of the application. Paragraphs 10 through 14 of the affidavit rehearse in almost identical terms paragraphs 10 through 15 of the grounds of the application.[2] The Claimant opposes the Application and by affidavit filed on April 22, 2014, he describes the Application as "an abuse of the process of the court", states that recourse can be had only to the Court of Appeal and that the time for doing so has already passed.

BACKGROUND

[2] The Claimant/Respondent[3] initiated action against the Defendant by Fixed Date Claim Form filed on February 22, 2007 in which he sought damages and costs against the Defendant and Second Named Defendant for slander by words spoken by the Defendant and broadcast on a radio station (Nice Radio 96.7 FM owned by the Second Named Defendant. The Claimant filed a Notice of Application on August 8, 2009 for an order pursuant to Part 26.3 of the Civil Procedure Rules 2000 ("CPR") striking out the defendant's defences[4] and for judgment to be entered for the Claimant for payment of damages to be assessed and costs. The Claimant and the Defendant were represented by counsel when that Application was heard on September 30, 2009. Counsel for the Claimant subsequently filed written submissions pursuant to an order for the parties to do so on or before October 16, 2009. Counsel for the Defendant filed none.

[3] By Decision dated November 16, 2009, Her Ladyship Madam Justice Jennifer Remy concluded that "the Defence of the 1st and 2nd Defendant has no reasonable chance of success, is incurably bad,

[2] Those grounds are set out in paragraph 5 of this judgment.

[3] Referred to hereafter as "the Claimant".

[4] On the ground that they did not establish reasonable defences

wholly unsustainable, without merit and is an abuse of the process of the court and should be struck out." It was ordered that the defence be struck out and judgment was entered for the Claimant *inter alia* as follows:

(a) Defendants are liable jointly and severally to the Claimant for damages to be assessed.

(b) ...

(c) Prescribed costs to the Claimant based on the quantum of damages awarded."

[4] The Claimant filed a Notice of Application on March 5, 2010 for damages to be assessed and costs, and directions for the hearing. By Order dated April 19, 2010, the Learned Master ordered the Claimant and the Defendant to file and serve evidence and submissions with authorities on the issue of quantum by July 2, 2010. Both parties were represented by their counsel at that hearing and again on February 10, 2012 when the hearing for the assessment of damages took place. Aggravated damages were assessed and awarded against the defendant in the sum of $155,000.00 with interest at the statutory rate of 5% and prescribed costs of $11,625.00. The Claimant applied subsequently for the Defendant to be examined orally as to his means to satisfy the judgment debt. The Defendant now seeks the orders in the instant application.

GROUNDS OF THE APPLICATION

[5] The grounds on which the Application is made are set out in the Defendant's Notice of Application as:

"(1) By Claim Form filed on the 22nd February 2007, the Claimant sought among other things damages and costs against the Defendant for slander, claiming that he was slandered by words spoken by the First Defendant broadcast to persons in St. Vincent and the Grenadines and St. Lucia on Nice Radio 96.7FM, owned by the Second Defendant.

(2) In his Statement of Claim, the Claimant pleaded that he is a Barrister-at-Law and Solicitor of the Eastern Caribbean Supreme Court in St. Vincent and the Grenadines,

that he is the political leader of the United Labour Party in this State, a Member of Parliament for the North Windward Constituency and is the present holder of the Office of the Prime Minister and Minister of Finance of the State of Saint Vincent and the Grenadines.

(3) The words complained of by the Claimant are set out in paragraph 5 of his Statement of Claim.

(4) in Paragraph 8 of his Statement of Claim the Claimant pleaded that, by reason of the publication of the said words the Claimant has been gravely injured in reputation as a Barrister-at-Law and solicitor of the Eastern Caribbean Supreme Court as well as his office as Prime Minister and has been brought into public scandal, contempt and ridicule and has suffered loss and damage.

(5) The Claimant claimed the following reliefs against the Defendants jointly and severally:-

1. General damages for slander committed on the 29th January 2007
2. Aggravated damages
3. Exemplary (sic)
4. An in junction (sic) preventing the Defendants whether by themselves, their respective servants and/or agents or howsoever otherwise from further speaking or publishing the said or similar words defamatory of the Claimant.
5. Cost.
6. Any further or other relief as the court thinks fit.

(6) By his Amended Defence filed on the 6th July 2007, the 1st Defendant pleaded that the Claimant is a non-practicing Barrister-at-Law and Solicitor. He denies paragraphs 6, 7, 8, 9, 10 and 11 of the Statement of claim and in particular denies that the words complained of could bear the meaning ascribed by the Claimant. He contends that the words complained of constituted fair comment and expressions of opinion made in good faith without malice upon mattes of public interest. Further, that the said words were published in the exercise of freedom of speech on the conduct of the claimant in his public capacity of Leader of the Unity Labour Political Party" and as Prime Minister and head of Cabinet of the Government of Saint Vincent and the Grenadines.

(7) The 2nd Defendant, in his Defence filed on the 23rd March 2007 pleaded:-

(i) In paragraph 5 that the words complained of were not understood to bear or were capable of bearing any of the defamatory meaning alleged by the claimant,

(ii) In paragraph 6, that the statements were published on an occasion of qualified privilege.

(8) By Notice of Application filed on 8th August 2009, the Claimant applied to the Court for an Order pursuant to **Part 26:3 of the Civil Procedure Rules 2000 (CPR)** for an Order that the Defendant's defences as filed do not establish reasonable defences to the action and should be struck out and Judgment entered for Claimant for the payment of an amount to be decide (sic) by the Court and costs.

(9) The application was heard and the Court ruled:-

1. The defence is therefore struck out

2. Judgment is hereby entered for the Claimant as follows:

(a) Defendants are liable jointly and severally to the Claimant for damages to be assessed.

(b) An injunction is granted preventing the Defendants whether by themselves, their respective servants and/or agents or howsoever otherwise from further speaking or publishing the said or similar words defamatory of the Claimant.

(c) Prescribed costs to the Claimant based on the quantum of damages awarded.

(10) No account was taken of **Civil Procedure Rules 15:3(d)(ii)** and its import to this case.

(11) **Civil Procedure Rules 15:3(d)(ii)** states:-

The Court may give summary judgment in any type of proceedings

except:-

(d) Proceedings for-

(ii) defamation

This hearing is one for defamation.

(12) Judgment was therefore entered under **Civil Procedure Rules 26:5** where there is no right to enter such judgment.

(13) The import of **Civil Procedure Rules 26:5** is that the Claimant must prove his case even if there is no defence.

(14) There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting relief.

per Fry, L.J., in ANALABY v PRAETORIUS {1888} 20 Q.B.D. 764, AT 769.....

(15) This judgment is an irregularly (sic) and ought to be set aside."

ISSUES

[6] The stated grounds 1 through 9 merely provide factual details and describe the events leading up entry of judgment against the Defendants. They are neither formulated as valid grounds which ground the application before the court. They are accordingly disregarded for the purposes of arriving at the decision in this matter except as far as is necessary to provide the chronological context within which the application is made and was considered.

[7] Grounds 10 and 11 raise the issue of the relevance of Rule 15.3 (d) (ii) of the CPR to the instant case and whether failure by the Learned Judge to give consideration to that Rule provides an opportunity to and mandates this Court to set aside the Order whereby judgment was entered against the Defendant for damages to be assessed and the subsequent order payment made for aggravated damages with interest and costs.

[8] Grounds 12 and 13 challenge the alleged entry of judgment pursuant to Rule 26.5 of the CPR and requires a consideration of whether this court can set aside that judgment entered pursuant to tha Rule.

[9] Grounds 14 and 15 are concerned with the singular issue of the Court's authority to set aside a judgment which is entered irregularly, and in this case on the assertion that the judgment entered by Order dated November 16, 2009 was an irregularity because it violated the requirements of Rules 15.3(d)(ii) and 26.5 of the CPR.

SUBMISSIONS - DEFENDANT

[10] Counsel for the Defendant, Mrs Bacchus Browne, made oral submissions in this matter at the hearing on June 25, 2014. These were substantially amplified in written submissions filed on July 4, 2014 as set out fulsomely below. In essence, Learned Counsel urged on the court in her oral submissions that this Application is made under rule 26.6(1) of the CPR and that the Learned judge did not take into account Rule 15.3(d)(ii) of the CPR which prohibits the court from entering summary judgment in a defamation suit. Mrs Bacchus Browne contends that instead of entering judgment pursuant to rule 15.3(d)(ii), the Learned Judge should have set a date for trial and given the Defendant time to cross-examine the Claimant as it was necessary for there to be a hearing. She cited the cases of **Wilson v Temujin International Limited**[5], **St. Lucia Motor and General insurance Company Limited v. Modeste**[6] and **Swain v. Hylton**[7] as authorities for the proposition that there is a distinct difference

[5] HCVBVI2006/307

[6] Claim No. 8 of 2009

[7] [2001] 1 All E.R. 91

between striking out a Defence under Rule 26.3 of the CPR and entering summary judgment under Rule 15 of the CPR.

[11] Mrs Bacchus Browne's written submissions were extensive and will be summarized below. Essentially, she submitted that:

"The Issues to be decided are:

1. Can judgment be entered for the claimant immediately upon striking out the Defendant's defence without a trial under *Civil Procedure Rules 26:3(1)?*
2. What is the import of *Civil Procedure Rules 15:3(d)(ii)?*
3. Does it matter if the Claimant's application is made under the *Civil Procedure Rule 26:3*? Is there a material difference between the tests under *Civil Procedure Rules 15:3* and *Civil Procedure Rules 26:3?*

She states:

"It is significant that under *Civil Procedure Rules 15: (3)* there is a notation referring to *Rule 26:3*." After quoting verbatim the provisions of Rules 26.3(1), 15.3 and 26.6(2) of the CPR Learned Counsel stated:

"In the case of **ANALBY AND OTHERS V PRAETORIUS 188 20 QBD 764 – [Tab 1]** The ratio may be stated thus:

> *(a) "There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside and setting the judgment, though regular; has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief."*
>
> *Per Fry, L.J., in **ANALABY V PRAETORIUS** [1888] 20 Q.B.D 764, AT 769*.....

[12] Learned Counsel Mrs Bacchus Browne also submitted: "In ***Lennox Hunter and Rachael Caesar et al*** Parnel R. Campbell QC applied to High Court 6 years after to set aside a judgment for irregularities. The damages were reassessed. ***[Tab 2]***

The judgment entered after striking out the defence in ***Gonsalves vs Thomas*** was therefore entered irregularly without recourse to *CPR 15.3(i)(d)* and that part entering judgment for the Claimant with damages assessed ought to be set aside by virtue of *CPR 26.6(2)*. Thus, the fact that damages were assessed under an irregular judgment cannot operate as a bar to stop the defendant from seeking to set aside the judgment.

In the case of *Curtis Zimmerman and BVI Tourist Board 2009/388 J. Bannister said at paragraph 18.* "The judgment of 24th December 2009 is irregular and is liable to be set aside.

In ***Troy Lewis and Constable Glendon Samuel Dominica 2010/0068. Lanns M.*** said at paragraph 10 and 11:

> *10. Where a defendant can establish that the correct procedures have not been followed in obtaining judgment, the defendant can have judgment set aside as of right without the requirement of establishing a defence to the claimant's claim. Here the court may set aside the judgment on or without an application (Rule 13.2). Rule 26.6 (2)* may be substituted here!"

[13] Learned Counsel added: "***In the case of Michael Wilson and Partners Ltd and 1 Temujin International Ltd et al. J. Hariprashad – Charles*** as she then was dealt comprehensively with this matter. Paragraph 4 – 14..... ***[Tab 3]***

> ***Paragraph 4*** *Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. The court has two distinct powers to achieve this. One is under CPR 26.1 where the court can strike out a statement of case of part of it if I discloses no reasonable grounds for bringing or defending a claim; or where the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings. The phrase discloses no reasonable grounds for bringing or defending a claim addresses two situations.*
>
> ***Paragraph 5*** *– The other power is under CPR 15. It gives the court the power to enter summary judgment against a claimant or a defendant when that party has no real prospect of succeeding on the claim or defence.* ***Undoubtedly, there is a substantial overlap between the two powers and an application can be made under both rules, as the Applicants have done in the present case.***"

"These cases show that the distinction between the tests under Civil Procedure Rule 26 or Civil Procedure 15 is most times indistinguishable."

[14] Mrs Bacchus Browne continued: "The Defendant has not appealed the decision to strike out the defence. Therefore he is stuck with that decision, however, that is not the end of the matter.

The learned Judge Remy at *Paragraph 56* of her ruling struck out the defence then proceeds at *paragraph 57* to enter judgment for the claimant. This is irregular.

In Richard Frederick and Lucus Frederick and Comptroller of Customs and the Attorney General. HCVAP 2008/037 at paragraph 46 and 47 George-Creque JA said: [Tab 5[

> *[46] It does not appear that anyone directed their minds to CPR Part 15 .... Quite apart from the fact that summary judgment may not be obtained on a fixed date claim form, it is similarly not obtainable in respect of proceedings for constitutional redress not, I might add for proceedings or claims against the Crown.* ***Dealing with a claim summarily does not mean entering summary judgment. The claimant must still prove that he is entitled to the relief sought. Therefore a trial must be conducted albeit in a summary way.*** "

[15] Learned Counsel for the Defendant further elaborated and stated: "If the court was dealing with the Claim summarily because there is no defence then the Claimant must still prove he is entitled to the relief sought. Therefore a trial must be conducted albeit in a summary way! This was not done in the present case instead the claimant had summary judgment entered. The matter should have proceeded to case management under CPR 26 as was done in *Frederick et al* cited above.

"Dealing with a claim summarily under Civil Procedure Rule 27 or 26 does not mean entering summary judgment but requires a trial of the issues between the parties to be conducted in a summary manner. The claimant Dr. Gonsalves must still prove that he is entitled to the relief sought. Very importantly Gonsalves pleaded malice by paragraph 10(b) of his claim form and **exemplary and/aggravated damages. The Claimant ought to prove this by a trial on oath!!** Also see *Alexander v Arts council of Wales 2001 1 WLR1840.* Also the case of *Rooks v Barnard (no1) 1964 AC1129*, Exemplary damages are not available as a matter of law unless a party pleads that the defendant was a public official who acted oppressively. See paragraph 35 *Lennox Linton v Anthony Astaphan (submitted by the Claimant.)* ***[Tab 6]"***

"It would be irregular to award exemplary and/or aggravated damages as was done without a trial on malice. [Tab 7] for damages to be assessed, "*The Claimant must adduce evidence that is probative of malice and not merely equally consistent with its existence." Paragraph 55 Linton Lewis.* Paragraph 10 allegations pleaded by the claimant against Matthew Thomas must be prove by the claimant in order for him to be awarded aggravated damages as he was. The pleadings are inadequate on the face of it to prove malice – see *Lennox Lewis paragraph 61 and 62."*

[16] Counsel for the Defendant also urged on the court that: "***Lewis v Anthony St. Lucia Civil Appeal No 2/2006*** is authority that ignorance of untruth is no basis for a plea of exemplary damages. There is no evidence the defendant Matthew Thomas knew Reuben Morgan was acquitted, or that Alex Lawrence was released, indeed there is no evidence that Alex Lawrence

was **indeed** released! *Paragraphs 10(b) (v) (vi) and (vii)* of the pleadings are Otiose unless cogent evidence is offered to prove it and tested under cross-examination.

"In ***Talford Roberts and Anesta Cass Humphrey.*** A St. Vincent case, the appellant submitted this:

> *(i) By striking out the Appellant's defence and counterclaim, Justice Remy in essence summarily determined the case and as such, she erred in this regard as summary judgment is not required to be given in fixed date claims pursuant to part 15.3 (b) of the CPR 2000.*

"On appeal the Court of Appeal stated the issue **"as whether or not a trial Judge can enter summary judgment or judgment in default or a fixed date claim form**, *CPR 15.3 (c)*". The same issue as before the court here. The defence had been struck out – The court of appeal held:

> *The appeal is allowed and the order set aside.*
>
> 1. *The time for filing a defence to the statement of claim is 14 days from today's date provided that the costs ordered in paragraph 4 of the order of this court made on 29th March 2012 is paid no later than Friday 8th June 2012.*
> 2. *There shall be no costs in the appeal. [Tab 8]"*

"The case of ***Talford Roberts and Anesta Cass Humphrey*** is on all fours with the present case. The only difference is that in the Talford Roberts the defendant failed to file a defence on time, after repeated orders to do so, then filed a defence of bare denials contrary to part 10:5(5) ***exactly as alleged by the Claimant in this case (see paragraph 16 of the judgment of Justice Remy).***

"The learned Judge Remy in Talford Roberts, upon submissions to strike out the defence for disclosing no reasonable ground for defending the claim under ***CPR 26:3 (b)*** and for first hearing under ***CPR 27:2 (3)***, without having a summary trial, proceeded to give judgment for the claimant just like in the present case. *(See copies of the transcript of the court in Talford Roberts) [Tab 9].* The record of appeal was out of time, Court of Appeal orders were ignored. Yet, the Court of Appeal set aside the judgment and ordered further time for the defendant to file a defence, because of *Civil Procedure Rule 15* prevented summary judgment."

"In the case *of Richard Williams Lexhart Inc. vs Olin Dennie Mc Connie Yammie Ltd St. Vincent HC 224/2006* ***[Tab 10],*** the case of *Edwardo Lynch vs Ralph Gonsalves* was discussed.

"The case of Richard Williams is significant for two reasons: It showed that even if a defence has been struck out or treated as being struck out, a trial can be proceeded with."

[17] Learned Counsel for the Defendant also contends: "In the Edwardo Lynch case ***HCVAP 2009/002*** the facts states that *"Justice Thom held the appellants (Lynch) had no prospect of*

succeeding in any of the defences and stuck them out. **Summary Judgment was entered for the appellants** with damages to be assessed." See [Tab 11]

"This was clearly wrong since the application before the court was identical to the application in the present case part 26.3(i). To enter summary judgment was contrary to CPR 15.3. The fact that witness statements were filed as well as documentary evidence in Lynch's case does not cure the irregular judgment. In any event Edwardo Lynch did not consider the irregularity or not of the summary judgment. The ration of the case was about assessment of damages.

"In the other case *Civil Appeal 18/2005 Edwardo Lynch vs Gonsalves* the issue of CPR 15:3 was also not considered and as stated above *Richard Frederick vs Comptroller of Customs* does not agree with the position of Justice Barrow at paragraph 11 and 12 of the 2005 Gonsalves judgment. *Richard Williams vs Olin Dennie et al followed Richard Frederick.*

[18] Learned Counsel for the Defendant concluded her written submissions with the following:

"As stated above there was no appeal against the decision to strike out the defence in Matthew Thomas's case. This decision must stand but the irregular part of the decision, the summary judgment must he set aside. As stated we are not challenging the order to strike out the defence. There is no discussion on a provision like CPR 15:3 in our rules.

"Lennox Linton and Anthony Astaphan

This case underscores the need for a trial for the Claimant to prove his case especially as the claimant pleaded malice and exemplary and aggravated damages see paragraphs 35, 54, 55, 61, 62. The meanings and damages of the words pleaded by Dr. Gonsalves at paragraph 6 and 10 of his claim are prolix, un-particularized, emotive and pejorative. He pleaded allegations which are equivocal and cannot sufficiently establish malice. It would be contrary to the interest of justice to let this irregular judgment for aggravated damages to stand without a trial for the claimant to prove his case. More over (sic) in *St. Lucia Motor and General Insurance Co. Ltd vs Peterson Modeste*. George-Creque Justice of Appeal held

> *"Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must bee shown is that the claim or the defence has no "real (ie realistic as opposed to fanciful) prospect of success. Having regard to the deficiency of the pleadings and the evidence, the defence of fraud/illegality is unlikely to meet with any degree of success so that the case is a suitable one for the entry summary judgment*

"This is what Justice Remy did entered summary judgment in a defamation matter. Justice George-Creque was speaking generally (except in CPR 15:3) cases). Thus the decisions in *Ralph Gonsalves vs Elwardo Lynch* and similar cases have no application since the issue of CPR 15:3 was not addressed as it was in Richard Frederick's case. The judgment ought to be set aside and

case management directions given with costs to the defendant. The fact that a ruling found that the words used by the defence are capable of being defamatory does not guarantee the finding of defamation without a trial albeit summarily."

SUBMISSIONS - CLAIMANT

[19] Learned Counsel for the Claimant Mr Bollers also made oral submissions which he supplemented with written authorities filed at the registry on June 25, 2014. Unfortunately, those authorities were misplaced and that mishap did not come to the undersigned's attention until the day before the date set for delivery of this decision. This decision is accordingly prepared without the benefit of those submissions. For this, the court apologizes to Counsel for the Claimant and to the Claimant.

[20] Mr Bollers directed the court's attention to paragraph 12 of the judgment of Justice Remy and indicated that the application to strike out was made pursuant to Rule 26.3 and not Part 15 of the CPR. He submitted that the Defendant's contention that an application for summary judgment was made by the Claimant under Part 15 has no basis in fact or in law. He submitted further that Rule 26.3 of the CPR empowers the court to strike out a claim without recourse to Part 15, each being separate and distinct applications. Counsel submitted further that an order on assessment of damages was delivered by the Learned Master in 2012, rendering this court *functus* with no open issues left for determination by this court. He submitted further that the proper avenue to be pursued by the defendant for relief was by way of appeal of the interlocutory order in 2009 or the final order in 2012. It is the Claimant's submission that the application should be dismissed with costs of $1200.00.

LAW AND ANALYSIS

[21] The applicable provisions of the CPR are rules 12.2, 12.5, 12.10 (1) (b), 13.2 (1) (b), 13.3 (1), 15.1, 15.2, 15.3 (c) & (d) (ii), 26.3 (1) (b), 26. 5 (1) and 26.6 (1). They provide:

> *" 12. 2 A claimant may not obtain default judgment if the claim is-*
> *(b) A fixed date claim;*
>
> *"12.5 The court office at the request of the claimant must enter judgment for failure to defend if-*
> *(a) (i) the claimant proves service of the claim form and statement of claim; or*
> *(ii) An acknowledgment of service has been filed by the defendant against whom judgment is sought*
> *(b) The period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
> *(c) The defendant has not-*
> *(i) filed a defence to the claim or any part of it ...;*
> *(ii) ...*
> *(iii)Satisfied the claim on which the claimant seeks judgment; and*
> *(iv) (if necessary) the claimant has the permission of the court to enter judgment.*
>
> *"12.10 (1) 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;*
>
> *"13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of*
> *(b) judgment for failure to defend any of the conditions in rule 12.5 was not satisfied.*
>
> *"13.3 (1) If rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant -*
> *(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
> *(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and*

(c) has a real prospect of successfully defending the claim.

15.1 This Part sets out a procedure by which the court may decide a claim or a particular issue without a trial.

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the

(a) claimant has no prospect of succeeding on the claim or the issue; or

(b) defendant has no real prospect of successfully defending the claim or the issue.

- *Rule 26.3 gives the court power to strike out the whole or part of a statement of case it it discloses no reasonable ground for bringing or defending the claim*

15.3 The court may give summary judgment in any type of proceedings except-

(c)proceedings by way of fixed date claim;

(d) proceedings for-

(ii) defamation;

26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or pat of statement of case if it appears to the court that-

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

26.5 (1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.

26.6 (1) a party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside."

[22] This Application raises a number of issues foremost of which is whether a judge can set aside a judgment made in error (whether of law or fact) by a judge of concomitant jurisdiction. The Privy Council decision of **Leymon Strachan v. The Gleaner Company & Anor**[8] is authority for answering that issue in the negative. At paragraph 32 of that decision, Lord Millett opined:

" The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits

[8] [2005] UKPC 33

of its own jurisdiction. From time to time, a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally... his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction: more often ... he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it."

[23] The Defendant in the instant case seeks an order setting aside the decision of Justice Remy where she entered judgment either in default of defence or summary judgment against the defendant, in circumstances where the defendant was represented by experienced counsel who neither made submissions on the application before the court nor sought to appeal the decision in accordance with the CPR. The decision in **Strachan v. The Gleaner Company** precludes this court from setting aside that decision for the reasons stated by Lord Millett. I so find.

[24] If perchance I am wrong however, the court must consider the other issues which have been identified above. I will proceed to address each of them. The defendant relies on Rule 15.3 (d) (ii) of the CPR to invalidate the order of Justice Remy whereby judgment was entered for the Claimant by a finding that the Defendants are jointly and severally liable to the Claimant for damages to be assessed. The defendant correctly asserts that Rule 15.3 (d) (ii) prohibits the court from entering summary judgment in proceedings by way of fixed date claims and also in proceedings for defamation. The instant case is both a fixed date claim and a defamation suit. Interestingly, the CPR contains no provisions empowering the court to set aside a summary judgment. In addition, the Defendant has not identified any legal authority which suggests that a judge of the High Court is empowered to set aside a summary judgment. All of the legal authorities presented by the Defendant[9] on this issue relate to judgments entered in default of defence or acknowledgment of service or summary judgments set aside by the Court of Appeal.

[25] In any event, even if the Court can entertain an application to set aside a summary judgment the successful applicant must surmount the hurdle of satisfying the requirements of Rules 26.6[10] (3) and 26.8 of the CPR which stipulate that the application must be:

(1) made promptly[11];

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[9] **Anlaby v. Praetorius 1888 20 Q.B. 764; Lennox Hunter v. Rachael Caesar et al Claim No. 317 of 2006; Richard Frederick v. Comptroller of Customs HCVAP 2008/037;**

[10] Or 26.6 (1) & (2) dealt with subsequently in the judgment

(2) supported hy evidence on affidavit;
(3) satisfy the court that:
(i) the failure to comply was not intentional;
(ii) there is a good explanation for the failure; and
(iii) he has generally complied with all other relevant orders, rules, practice directions, directions;

Conditions (1), (2) and (3) (i) and (iii) are self- explanatory. What is a "good explanation" depends on the circumstances of each case. Without defining the expression, the Privy Council in the case of **The Attorney General v. Universal Projects Limited**[12] opined "if the explanation for the breach ... connotes real or substantial fault on the part of the defendant, then it does not have a good explanation...". The defendant in this case has not provided affidavit evidence which is supportive of any of these conditions. The Application is extremely tardy and there is no evidence in it to explain the defendant's tardiness or to indicate that this was not intentional. His application accordingly fails on this ground as it provides no basis on which to set aside the Honourahle Judge's order.

[26] The defendant at grounds 12 and 13 of his application assert that the entry of judgment was made pursuant to rule 26.5 of the CPR. An examination of that rule however illustrates that this is incorrect. By sub-rule (1) of Rule 26.5, that Rule is invoked only if the court makes an "unless order" stipulating time for compliance. The factual matrix in this case does not include an "unless order." In the premises, neither Rule 26.5 nor rule 26.6 (1) & (2) are applicable to the instant case. The defendant's application to set aside the judgment would therefore fail on grounds 12, 13, 14 and 15 as the judgment was not entered under Rule 26.5 of the CPR.

|27| The defendant's suhmissions obliquely touch on entry of a default judgment under Part 12 of the CPR. For completeness, suffice it to say that the defendant would not be able to avail himself of an order to set aside the judgment under rule 12.5 (even if a default judgment was entered)[13]. It is trite law that an applicant seeking to obtain an order under rule 12.5 to set aside a default judgment must satisfy the three conditions outlined at rule 13.3 (1):
(1) applies as soon as reasonahly practicable after learning that the judgment has been entered;

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[11] Depends on the circumstances of the case – **Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v. Antigua Commercial Bank**

[12] [2011] UKPC 37

[13] It is clear that a default judgment was not entered as the judgment made no reference to entry of a default judgment

(2) gives a good explanation for failure to file acknowledgment of service or defence; and
(3) has a real prospect of defending the claim.

These conditions are conjunctive and mandatory – see **Louise Martin as widow and executrix of the Estate of Alexis Martin, deceased) v. Antigua Commercial Bank.**[14] The defendant obviously did not satisfy any of the conditions. Rule 13.3 does not assist him for the reasons advanced above.

[28] The Defendant raised a few matters in his written submissions which go outside of the ambit of the Application as filed and venture into the realm of appeal proceedings. They have not been addressed as it is inappropriate for this court to entertain them.

ORDER

[29] For the foregoing reasons, this case is not one which lends itself to the grant of the reliefs sought. It is ordered as follows:

1. The Defendant's application for an order setting aside the judgment is dismissed.

2. The Defendant shall pay the Claimant costs of $1200.00.

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Esco L. Henry

HIGH COURT JUDGE (Ag.)

[14] ibid