**EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**SAINT LUCIA**

**SLUHCVAP2013/0006**

**BETWEEN:**

**PATRICK SMITH**

Appellant

**and**

**[1] HEIRS OF CAMSELLE ST. CATHERINE**
**[2] DARIUS ST. CATHERINE**
**[3] ST. ROSE ST. CATHERINE aka ST. ROSE CAMSELLE**
**[4] SEMEPHER ST. CATHERINE aka SEMEPHER CAMSELLE**

Respondents

**Before:**

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| The Hon. Mr. Davidson Kelvin Baptiste | Justice of Appeal |
| The Hon. Mr. Mario Michel | Justice of Appeal |
| The Hon. Mde. Gertel Thom | Justice of Appeal [Ag.] |

**Appearances:**

Mr. Dexter Theodore and Mr. Alberton Richelieu for the Appellant
Ms. Lydia Faisal for the 1st Respondent
Ms. Esther Greene-Ernest for the 2nd, 3rd and 4th Respondents

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2014: April 9;
2015: January 29.

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*Civil appeal – Default judgment – Fixed date claim – Res judicata – Sale of property – Improbation of deed of sale and declaration of succession – Application for default judgment made on fixed date claim – Entry of default judgment on fixed date claims prohibited by CPR 12.2(b) – Nature of resulting order – Whether order liable to be set aside in whole or in part by judge of co-ordinate jurisdiction – Whether learned trial judge erred in holding that order made on default judgment application was final order – Whether order created estoppel against further litigation of issues surrounding validity of deed of sale to appellant of subject property – Whether doctrine of res judicata can bind non-party – Article 1171 of Civil Code of Saint Lucia*

The appellant purchased a portion of land at Pierrot in the Quarter of Vieux Fort in Saint Lucia ("the Property") by deed of sale executed before two Notaries Royal on 9th November 2000. Three of the four vendors named in the deed of sale are the second to fourth respondents to this appeal and the remaining vendor was one Regina St. Catherine (now deceased). Prior to this sale, on 29th February 2000, a declaration of succession had been executed before the same two Notaries Royal before whom the deed of sale was executed, which declaration of succession declared that the four vendors were the lawful children and heirs of one Camselle St. Catherine, who was (at the date of his death) the owner of the land from which the Property was extracted.

It was subsequently established that three of the four declarants to the declaration of succession were in fact not children of Camselle St. Catherine and that, at the date of his death, Camselle St. Catherine had four children who were his lawful heirs, one of whom was Regina St. Catherine and three of whom were parents of the other three declarants.

The underlying proceedings in this matter were commenced in the High Court on 28th May 2003 by means of a fixed date claim filed by Agatha Jules, representing the Heirs of Camselle St. Catherine ("the claimants"). The claim was filed against the four declarants to the declaration of succession ("the defendants") and what was being sought was the improbation of the declaration of succession and of any deed of sale arising therefrom. The first hearing of the matter took place before Shanks J on 4th July 2003, who gave directions for the filing of defences and witness statements and fixed the case for trial on 9th December 2003. On this date, the matter was heard by Hariprashad-Charles J, who directed that application be made by the claimants for default judgment against the defendants, who had not filed any defences or witness statements. The claimants followed this instruction, and on 5th February 2004, filed a notice of application for judgment in default against the defendants, excepting Regina St. Catherine against whom the claim was discontinued.

The matter came before Edwards J in Chambers on 10th March 2004 and, after reading the affidavit deposed to by the claimants (which addressed the default of the defendants in responding to the claim filed), she made an order improbating both the declaration of succession and the deed of sale executed in favour of the appellant. Following from this order, the registration of the declaration of succession and of the deed of sale were cancelled by the Land Registry on 25th March 2004 and in April 2007, a new declaration of succession was registered naming the rightful heirs of Camselle St. Catherine.

Some four years after the making of the above order, on 3rd June 2008, the appellant filed a notice of application to set aside the order in accordance with rules 11.18 and 13.2(1)(a) of the Civil Procedure Rules 2000 ("CPR 2000"). The application was made on the grounds that the appellant was directly affected by the entry of judgment; he was never served with the claim form or statement of claim or any notice of the proceedings whatsoever and neither was he served with a notice of the hearing; he had not been served with the order dated 10th March 2004; he had a real prospect of successfully defending the claim; and had he attended it was likely that some other order might have been made. The appellant sought, inter alia, to be added as a defendant in the matter and also to have the order of Edwards J varied by substituting for paragraph 2 (which

paragraph had improbated the deed of sale) an order that the defendant be at liberty to file a defence herein.

The appellant's set aside application came before Cottle J on 1st October 2008 and the judge granted the application and gave the appellant leave to file and serve a defence by 24th October 2008. On this date, the appellant (then joined as a defendant in the May 2003 claim) filed a defence and counterclaim and an ancillary claim against the other defendants. On 18th and 19th November 2008 the first named respondents to this appeal filed a reply to the appellant's defence and a defence to his counterclaim, and the other three respondents filed a defence to the appellant's ancillary claim. All four of the respondents joined issue with the appellant on the averments made by him in his defence and counterclaim and his ancillary claim form.

On 30th October 2009, the first-named respondents (as claimants in the court below) filed a notice of application seeking a declaration that there was an existing order of the court made on 10th March 2004 (that is, the order of Edwards J); and that by virtue of this order which has not been appealed against or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial. The first-named respondents further sought to have any further litigation in the proceedings stayed until the order of Edwards J was set aside. The application came up for hearing before Georges J on 22nd January 2010. The learned judge found in favour of the claimants (that is, the first-named respondents to this appeal) and granted the declarations and orders sought by them.

The appellant applied for leave to appeal, which leave was granted by Belle J on 28th June 2011. The appellant filed a notice of appeal on 7th March 2013, this appeal being based on several grounds, which included that the learned judge erred in law by ruling that the order of Edwards J was a final judgment which could only have been set aside on appeal, whereas it was a default judgment which could be (and was) set aside in whole or in part by a judge of co-ordinate jurisdiction; and that the learned judge's rulings showed a lack of appreciation for the fundamental legal principle that the appellant, not being a party to the proceedings before Edwards J, was not bound by that order and cannot be prevented by it from pursuing his claim to the land forming the subject matter of this case.

**Held:** allowing the appeal to the extent that paragraphs 2 and 3 of the order of Georges J being appealed are set aside, that:

1. The order of Edwards J was either a final order by virtue of being a judgment on a fixed date claim, or a default judgment improperly granted on a fixed date claim. If, as Georges J determined, it was a final order, then it can only be set aside on appeal by the Court of Appeal. Alternatively, if it was a default judgment, then it was an order made by a judge without jurisdiction, since rule 12.2(b) of CPR 2000 does not permit a claimant to obtain default judgment on a fixed date claim. Even if, however, it was a defective default judgment, the order is not wholly without effect and it must be obeyed unless and until it is set aside by the Court of Appeal. It cannot be set aside by a judge of co-ordinate jurisdiction. Accordingly, the order made by Cottle J, in which he purported to set aside Edwards J's order

improbating the deed of sale, was a nullity; this order could only have been set aside by the Court of Appeal.

**Strachan v The Gleaner Co Ltd and another** [2005] 1 WLR 3204 applied.

2. Notwithstanding that the appellant might have been fully aware of the events leading up to and following from the making of the order by Edwards J, he was not a party to or represented in the proceedings leading to the order and so cannot be prevented from re-litigating the issues adjudicated upon and/or determined by the learned judge. The order made by Edwards J on 10th March 2004, although binding on the parties to it, is not binding on the appellant.

**Noellina Maria Prospere (Nee Madore) v Frederick Prospere, Jennifer Remy** [2007] UKPC 2 followed; **Roberge v Bolduc** [1991] 1 SCR 374 applied; Article 1171 of the **Civil Code** Cap. 4.01, Revised Laws of Saint Lucia 2008 applied.

## JUDGMENT

[1] **MICHEL JA:** The appellant in this case purchased a portion of land at Pierrot in the Quarter of Vieux Fort in Saint Lucia by deed of sale executed before Kenneth A. H. Foster, QC and Isabella Shillingford, Notaries Royal, on 9th November 2000. The vendors named in the deed of sale (minus their aliases) were Darius St. Catherine, St. Rose St. Catherine, Regina St. Catherine and Semepher St. Catherine, and their title was stated to be – 'Entry in the Land Registry as Block 1222B Parcel 68 Lot 1 VF 1438K'. Although not expressly stated in the deed of sale, the case in the court below proceeded on the basis that the authority of the vendors to sell was derived from a declaration of succession executed before the aforesaid Kenneth A. H. Foster, QC and Isabella Shillingford on 29th February 2000. The declaration of succession declared that the four declarants (who were the same four persons named as vendors in the deed of sale) were the lawful children and heirs of Camselle St. Catherine, who was (at the date of his death) the owner of the land from which Block 1222B Parcel 68 was extracted.

[2] As the case went through its various stages and phases in the High Court, with no less than seven High Court judges presiding over and making orders in the case over a period of ten years, it was established that in fact three of the four declarants to the declaration of succession were not children of Camselle St.

Catherine and that, at the date of his death, Camselle St. Catherine had four children who were his lawful heirs, one of whom was Regina St. Catherine and three of whom were parents of the other declarants. The said Regina St. Catherine was named as a defendant in the underlying case, although she had in fact died before the filing of the case, and the case against her was discontinued by notice of discontinuance filed on 5th February 2004.

[3] This case started life on 28th May 2003 by means of a fixed date claim filed by Agatha Jules (representing the Heirs of Camselle St. Catherine) against the four declarants to the declaration of succession, seeking an improbation of the declaration of succession and of any deed of sale arising therefrom. The first hearing of the matter took place before Shanks J on 4th July 2003, who gave directions for the filing of defences and witness statements and fixed the case for trial on 9th December 2003. On 9th December aforesaid, the case came before Hariprashad-Charles J, who directed that application be made by the claimants (the first-named respondents to this appeal) for default judgment against the defendants (the declarants to the declaration of succession) who had not filed any defences or witness statements as directed by Shanks J.

[4] On 5th February 2004, a notice of application was filed by the claimants for judgment in default against the defendants, excepting Regina St. Catherine against whom the claim was discontinued.

[5] The matter came up for hearing before Edwards J in Chambers on 10th March 2004, who ordered that:

(1) the declaration of succession registered as Instrument No. 2071/2000 be improbated;

(2) the deed of sale executed by the defendants in favour of Patrick Smith be improbated;

(3) costs in the sum of $6,300.00 to the claimant to be paid by the 1st, 2nd and 4th defendants.

[6] Edwards J's order recorded the fact that none of the defendants, or counsel on their behalf, was present and that the court had read the affidavit deposed to by the applicant, which would have been the affidavit in support of the application for default judgment sworn to by Agatha Jules as the representative of the Heirs of Camselle St. Catherine.

[7] Following from this order, the registration of the declaration of succession and of the deed of sale were cancelled by the Land Registry on 25th March 2004 and in April 2007 a new declaration of succession was registered naming the rightful heirs of Camselle St. Catherine.

[8] Some four years after the making of this order, on 3rd June 2008, the appellant filed a notice of application to set aside the order in accordance with rules 11.18 and 13.2(1)(a) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR 2000"). The grounds of the appellant's application were as follows:

(1) the appellant is directly affected by the entry of judgment;

(2) the appellant was never served with the claim form, or statement of claim or any notice of these proceedings whatsoever and was not served with notice of the hearing on 10th March 2004;

(3) the appellant has not been served with the order dated 10th March 2004;

(4) the appellant has a real prospect of successfully defending the claim;

(5) had the appellant attended it is likely that some other order might have been made.

[9] The orders sought by the appellant in his notice of application were the following:

(1) that he be added as a defendant herein;

(2) that the order dated 10th March 2004 and entered herein on 10th March 2004 be varied by deleting paragraph 2 and substituting therefor an order that the applicant be at liberty to file a defence herein; and

(3) inhibiting until further order any dealing with parcel 1222B 68.

[10] On 10th June 2008, Mason J made an order that there be an inhibition on any dealing with the subject property until further order of court.

[11] On 1st October 2008, when the appellant's set aside application of 3rd June 2008 came before Cottle J, the learned judge made the following orders:

(1) The application by applicant is granted.

(2) Leave granted to Mr. Patrick Smith to file and serve defence by 24th October 2008.

[12] On 24th October 2008, the appellant (then joined as a defendant in the May 2003 claim) filed a defence and counterclaim and an ancillary claim against the other defendants.

[13] On 18th November 2008, the first-named respondents to this appeal (who were the claimants in the court below) filed a reply to the appellant's defence and a defence to his counterclaim, while on 19th November 2008 the other three respondents filed a defence to the appellant's ancillary claim. All four of the respondents joined issue with the appellant on the averments made by him in his defence and counterclaim and his ancillary claim form.

[14] On 30th October 2009, the first-named respondents (as claimants in the court below) filed a notice of application seeking the following declarations and/or orders from the court:

(1) That there is an existing order of the court in claim SLUHCV 2003/0444 made on 10th March 2004.

(2) That by virtue of the order entered in claim SLUHCV2003/0444 on 10th March 2004, which has not been appealed against or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial.

(3) Any further litigation in claim SLUHCV2003/0444 is stayed until the order of 10th March 2004 is set aside on appeal.

[15] The grounds of the application were the following:

(1) That the court having heard and having determined the issues in claim SLUHCV2003/0444, it would be an abuse of process to re-litigate the same issues while a judgment stands.

(2) That by virtue of the existence of the said judgment/order, the said Patrick Smith is estopped from defending the matters at this stage, but was entitled to appeal which he did not.

(3) That should the court proceed to reopen the matter whilst the judgment/order stands, it would be proceeding upon a serious error of law.

[16] Written submissions were filed by Ms. Lydia Faisal on behalf of the first-named respondents (who were the claimants in the court below), by Ms. Kim St. Rose on behalf of the second, third and fourth-named respondents (who were the first, second and fourth defendants in the court below) and by Messrs Dexter Theodore and Alberton Richelieu on behalf of the appellant (who had been joined as the fifth defendant in the court below).

[17] The application came up for hearing before Georges J on 22nd January 2010 and 22nd March 2010, who heard oral submissions by all counsel representing the parties and thereafter reserved judgment in the matter. In his judgment dated 20th January 2011, Georges J granted the following declarations and orders sought by the claimants in the court below:

(1) That there is an existing order of the court in claim SLUHCV2003/0444 made on 10th March 2004.

(2) That by virtue of the order entered in claim SLUHCV2003/0444 on 10th March 2004, which has not been appealed or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial.

(3) Any further litigation in claim SLUHCV2003/0444 be stayed until the order of March 10th 2004 is set aside on appeal.

[18] On 17th February 2011, the appellant filed a notice of application for leave to appeal against the judgment of Georges J, which application was opposed by the other parties. All parties made written submissions in support of or in opposition to the application for leave to appeal. The application for leave was heard by Belle J on 28th June 2011, whereupon he reserved judgment. By judgment dated 21st February 2013, Belle J granted the appellant leave to appeal against the judgment of Georges J and notice of appeal was filed by the appellant on 7th March 2013. The grounds of appeal are as follows:

(1) The learned judge erred in law by making premature findings of fact adverse to the appellant and his title to the land forming the subject matter of this case on an interlocutory application without the appellant having had an opportunity to test the allegations under cross-examination.

(2) The learned judge erred in law by ruling that the order of Edwards J was a final judgment which could only have been set aside on appeal whereas in point of law it was a default judgment which could be (and was) set aside in whole or in part by a judge of co-ordinate jurisdiction.

(3) The learned judge misdirected himself in law by ruling that the order of Cottle J was incapable of restoring the appellant's title to the lands in dispute although the learned Cottle J was at all material times a judge of

co-ordinate jurisdiction with Edwards J who had the jurisdiction to (and did) vary the order of Edwards J.

(4) The learned judge misdirected himself by ruling that the appellant's deed was of no value although the order to cancel its registration had not been made after a hearing on the merits and the part of the order relating to the cancellation had been later deleted by a subsisting order of court.

(5) The learned judge misdirected himself by ruling that the appellant is estopped from defending the matter because most of the factual issues have already been determined by the court by failing to appreciate that the parties to the prior judicial proceedings before Edwards J did not include the appellant and therefore 'the mutuality requirement' necessary to ground res judicata is not satisfied.

(6) The learned judge's ruling that:

(a) although the appellant was not party to the claim and the point has not already been decided it was not open to him to maintain that he was a bona fide purchaser for value without notice;

(b) having made findings adverse to the appellant in a claim in which he was not a party the court cannot now come to a different conclusion;

betrayed a lack of appreciation of the fundamental legal principle that the appellant, not being a party to the proceedings before Edwards J, was not bound by that order and cannot be prevented by it from pursuing his claim to the land forming the subject matter of this case.

(7) The learned judge erred in law by questioning the effect in law of the order of Cottle J, which had not been appealed, nor in respect of which was there any application to set aside or vary.

[19] Georges J made three orders in the judgment being appealed. The first is that 'there is an existing order of the court in Claim SLUHCV2003/0444 made on the 10th day of March 2004'. Inasmuch as the appellant may argue that one of the paragraphs of the aforesaid order has been set aside by a subsequent order of Cottle J, it is beyond doubt that the order of 10th March 2004 exists, only that there is an issue (which will be addressed in this judgment) as to whether it remains wholly in effect notwithstanding an order made by Cottle J setting aside one of its provisions. The third order made by Georges J, which stayed further litigation in the case until the order of Edwards J was set aside on appeal, directly arose from the second order which he made and stands or falls with it. The nub of the appeal therefore is the second order made by Georges J that 'by virtue of the order entered in Claim SLUHCV2003/0444 on the 10th day of March 2004, which has not been appealed or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial'.

[20] The essential question to be determined in this appeal, therefore, is whether the 10th March 2004 order of Edwards J is a valid subsisting order and creates an estoppel against any further litigation of the issues surrounding the validity of the deed of sale to the appellant of the subject property.

[21] Counsel on behalf of the appellant argued – both in the written and oral submissions made on behalf of the appellant – that the 10th March 2004 order of Edwards J was a default judgment, which could therefore be set aside by a judge of co-ordinate jurisdiction and which could not create an estoppel against further litigation of the issues determined by the order.

[22] The argument that the order of 10th March 2004 was a default judgment derives its force from three factors: firstly, that the application which led to the making of the order was stated to be an application for a default judgment; secondly, that the defendants had not filed any defence to the claim; and thirdly, that no other party, apart from the applicant, was present or represented at or served to attend the hearing at which the order was made.

[23] I am of the view that the fact that the application leading to the Edwards J order was stated to be an application for default judgment was a consequence only of the order preceding and directing the making of the application. Hariprashad-Charles J, at the scheduled trial of the matter in December 2003, made a determination 'that the matter is premature before the Court' and that the claimant should serve the claim on the defendant who had not been served (who, unbeknownst to the learned judge, had predeceased the filing of the claim) and go the route of applying for default judgment.

[24] The claimant complied with the learned judge's directions and intimations and filed an application for default judgment. The claimant also filed a notice of discontinuance against the deceased, unserved defendant.

[25] When the application for default judgment came before Edwards J, she did not make an order which was expressed to have been premised on any default by the defendants in complying with any rule, order or procedure. Instead, the preamble to the order stated that what was before the court was the hearing of an application; that the court had read the affidavit deposed to by the applicant; and that counsel for the claimant was present, but the defendants were absent and unrepresented, 'although Mr. Kenneth Foster QC is their Counsel'. The learned judge then proceeded to make the orders that she did.

[26] It is of note that, at the time of the making of the order by Edwards J, no defence had been filed by any of the defendants, although they were directed, and given an extension of time, to do so by Shanks J. It is also of note that none of the defendants was present or represented at the hearing before Edwards J, although they were served with the fixed date claim and were represented at the first hearing of the matter before Shanks J. It is also of note that the affidavit deposed to by the applicant, which affidavit the learned judge referred to in the preamble to the order, was not an affidavit dealing with the merits of the claim but one which addressed the default of the defendants in responding to the claim filed by the claimants. Neither of these facts, however, nor the fact that the application made

to the court was for a judgment in default, could lead to the order of Edwards J being a default judgment in accordance with CPR 2000, because rule 12.2(b) of CPR 2000 prohibits the granting of a default judgment on a fixed date claim.

[27] In the result, the order of Edwards J is either a final order, by virtue of being a judgment on a fixed date claim, or it is a default judgment improperly granted on a fixed date claim. If it is a final order, as determined by Georges J, then – as he also determined – it could only be set aside on appeal to the Court of Appeal. If, however, it is a default judgment, then it is an order made by a judge without jurisdiction, having been made on a fixed date claim when CPR 2000 does not permit this to be done. In that event, and in accordance with the judgment of the Privy Council in the Jamaican case of **Strachan v The Gleaner Co Ltd and another**,[1] the order is not wholly without effect and it must be obeyed unless and until it is set aside by the Court of Appeal.

[28] At page 3212, paragraph 28 of the judgment, Lord Millett – delivering the judgment of their Lordships – stated as follows:

> "An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and … it provides a sufficient basis for the Court of Appeal to set it aside."

[29] At page 3213, paragraph 32 of the judgment, Lord Millett stated as follows:

> "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 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."

[1] [2005] 1 WLR 3204.

[30] On the authority of **Strachan v The Gleaner Co Ltd**, it is clear that if Edwards J's order is in fact a default judgment – as contended for by the appellant – then it is one made without jurisdiction, but it can only be set aside on appeal to the Court of Appeal and not by a judge of co-ordinate jurisdiction, and until it is set aside by the Court of Appeal, 'it is not wholly without effect' and 'it must be obeyed'.

[31] Of course, if Edwards J's order is a final judgment, then it is also a judgment or order which can only be set aside on appeal to the Court of Appeal.

[32] The order made by Cottle J, therefore, in which he purported to set aside the order of Edwards J improbating the deed of sale, was a nullity, having been made by a High Court judge when only an appeal court could set aside the order of Edwards J (whether in whole or in part).

[33] Cottle J's order setting aside part of Edwards J's order does not, however, remain valid and to be obeyed unless and until it is set aside by the Court of Appeal, because it is simply a nullity. It is, in that regard, different from Edwards J's order, in so far as that order was a default judgment made without jurisdiction to make such an order because the claim was a fixed date claim which could not – by virtue of rule 12.2(b) of CPR 2000 – lead to a default judgment. Edwards J might have exceeded her jurisdiction in making an order which she was not authorised by CPR 2000 to make, but it was an order which a High Court judge had the jurisdiction to make, though not on the particular facts before Edwards J at the time. In the case of Cottle J's order, however, it was an order which a High Court judge simply could not make – the jurisdiction to make the order being vested in the Court of Appeal.

[34] The difference between the legal effect of Edwards J's order of 10th March 2004 and the part of Cottle J's order of 1st October 2008 setting aside the improbation of the deed of sale is explained in the case of **In re Padstow Total Loss and Collision Assurance Association**[2] where the English Court of Appeal

[2] (1882) 20 Ch D 137.

distinguished the situations when a High Court judge has exceeded his or her jurisdiction and made an order which is effective until it is set aside by the Court of Appeal and when a High Court judge assumes a jurisdiction that he or she does not have and makes an order that is consequently void for want of jurisdiction. This distinction clearly applies on the facts of this case, with Edwards J's order coming within the first situation and Cottle J's order coming within the second.

[35] Having found that the 10th March 2004 order of Edwards J was a final judgment which could only be set aside on appeal, Georges J proceeded to make the further finding that the doctrine of res judicata would prevent the court from revisiting the issues addressed and/or determined by the order.

[36] This further finding by Georges J is consistent with and justified by several cases on res judicata decided over the years by the Privy Council and the House of Lords, the most authoritative of which, in the context of this appeal, being the judgment of the Privy Council in the Saint Lucian case of **Noellina Maria Prospere (Nee Madore) v Frederick Prospere, Jennifer Remy**,[3] where the Privy Council held that, even if a previous judgment is regarded as a default judgment, it is enough to prevent a party to the proceedings giving rise to the judgment from re-litigating the same issue in a later action.

[37] The res judicata principle would still come into play even if Edwards J's order is determined to be a default judgment made without jurisdiction. In **Strachan v The Gleaner Co Ltd**, the Privy Council held that an order made by a judge without jurisdiction to make the particular order could be reversed by the Court of Appeal but, 'as between the parties … and unless and until reversed by the Court of Appeal, his decision … was res judicata'.

[38] On the authority of these two Privy Council judgments (on appeals from Saint Lucia and Jamaica) it is clear that the parties to the case before Edwards J are

[3] [2007] UKPC 2.

estopped by the doctrine of res judicata from re-litigating the issues determined by the order of 10th March 2004.

[39] What though is the position when, as in the present case, the party sought to be estopped by a previous judgment or order was not a party to the proceedings at the time of the making of the order or the rendering of the judgment?

[40] Article 1171 of the **Civil Code**[4] provides as follows:

> "The authority of a final judgment (*res judicata*) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."

[41] The crucial part of article 1171 relative to the question posed in paragraph 38 above is the part containing the words 'is between the same parties'.

[42] In the case of **Roberge v Bolduc**,[5] L'Heureux-Dubé J – in giving the judgment of the Supreme Court of Canada – interpreted the provisions of the Civil Code of Lower Canada as they apply to res judicata, which are equivalent to article 1171 of the **Civil Code** of Saint Lucia. In terms of the words 'is between the same parties', the interpretation of them in the context of res judicata in the **Roberge** case is that 'the principle only prevents re-litigation of an issue by those who were parties to or represented in, and so bound by, the first judgment, and who act in the same capacity in the second proceedings'.[6]

[43] In the present case, although the appellant might well have been fully aware of everything leading up to and following from the making of the order by Edwards J, and there is evidence that he was, he was not a party to or represented in the proceedings leading to the order and so cannot be prevented from re-litigating the

[4] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[5] [1991] 1 SCR 374.
[6] See para. 12 of Noellina Maria Prospere (Nee Madore) v Frederick Prospere, Jennifer Remy [2007] UKPC 2.

issues adjudicated upon and/or determined by the learned judge. The case of **Prospere v Prospere** is exactly on point.

[44] In **Prospere v Prospere**, where Mrs. Prospere sought to re-litigate an issue already litigated by her ex-husband, the Privy Council held that, even though Mrs. Prospere was fully alive to the previous proceedings conducted by her husband at the time, she was not a party to or represented at the proceedings and so she is not bound by the order resulting from it and cannot be prevented by virtue of that order from pursuing her claim to the same land which was the subject matter of the previous proceedings.

[45] There is provision in rule 42.12 of CPR 2000 for a person who is not a party to a claim to be bound by the terms of an order made in the claim when the order might in fact affect the rights of the aforesaid person. For this rule to come into play, however, the court must direct that a copy of the order be served on the person intended to be bound and the order must be served on him endorsed with a notice in Form 13 of the Appendix to CPR 2000. The person so served is entitled, by virtue of rule 42.12(6), to apply to the court within 28 days of the service of the notice on him to discharge, vary or add to the order.

[46] Where rule 42.12 comes into play, the party served with the order is bound by the terms of the order to the extent that his property rights, for example, may be affected by the terms of the order, but he is not bound by the order such that he cannot reopen issues already determined in the order. In fact, sub-rule (6) of rule 42.12 enables him to do just that.

[47] There is also provision in article 381 of the **Code of Civil Procedure**[7] (referred to by both Ms. Faisal for the first-named respondents and Ms. Greene-Ernest for the other respondents) for a person who is not a party to a case, but whose interests are affected by a judgment rendered in the case, to file an opposition to the judgment. Article 381 states:

[7] Cap. 243, Revised Laws of Saint Lucia 1957.

> "Any person whose interests are affected by a judgment rendered in a case in which neither he nor persons representing him were made parties, may file an opposition to such judgment."

This article creates another pathway for a non-party to enter the arena in an action affecting his interests, but it certainly does not block other pathways into the arena for affected non-parties.

[48] In accordance with article 1171 of the **Civil Code** and with the cases of **Roberge v Bolduc** and **Prospere v Prospere**, the order made by Edwards J on 10th March 2004, although binding on the parties to it, is not binding on the appellant, Patrick Smith, such as to prevent him from having the court to revisit an issue which directly affects his interest and on which he has not been heard by the court.

[49] Having taken the view that Edwards J's order improbating the appellant's deed of sale is either a final judgment which could only have been set aside on appeal to this Court or a defective default judgment which also could only be set aside by this Court, and the aforesaid order not having been appealed; and having taken the view that the appellant is not estopped by the doctrine of res judicata from reopening the issue of the validity of his deed of sale; where then does this leave this eleven year-old case which has already gone before seven High Court judges and three justices of appeal?

[50] Whether the order of Edwards J is a final order or a defective default judgment, the appellant – not having been a party to the proceedings leading to the order – is not bound by it and can re-litigate the issues determined by the order. The appellant having (with the leave of the court) filed a defence to the claim and having filed an ancillary claim, the case ought now to go back to the High Court for case management and trial of the claim brought by the first respondent against the other respondents and against the appellant who was added as a defendant. Unless the Edwards J order is appealed and set aside, however, the res judicata principle would apply as between the first respondent on the one hand and the other respondents on the other hand, who would not therefore be able to re-litigate the issues determined in the order of Edwards J made on 10th March 2004.

[51] I should point out that the invalidity of Cottle J's order setting aside a part of Edwards J's order does not affect the validity of the rest of his order permitting the appellant to be joined as a party to the claim and giving him leave to file and serve a defence. Cottle J, as a High Court judge, had the jurisdiction to make 'the permission and leave order' and its validity is not affected by the invalidity of 'the setting aside order'.

[52] Before pronouncing on the appellant's grounds of appeal and the orders to be made by this Court, I should address one of the other arguments advanced by counsel for the appellant, both in written and oral submissions before this Court. It was advanced on behalf of the appellant that Edwards J erred when she improbated the appellant's deed of sale without either the appellant or the executing notaries being parties to the case. This argument was based on a judgment of this Court in the case of **Marguerite Desir et al v Sabina James Alcide**.[8] Apart from the fact that that judgment is now on appeal to the Privy Council, the argument advanced by the appellant could only be properly advanced on an appeal against the 2004 order of Edwards J and not on an appeal against the 2011 judgment of Georges J, because it is the Edwards order and not the Georges judgment which improbated the deed of sale.

[53] As to the status of the appellant's grounds of appeal, having regard to the determinations made and/or conclusions arrived at in this judgment, I would make the following orders:

(1) The appellant's first ground of appeal is allowed to the extent that any findings of fact made by Georges J on the appellant's title to the land forming the subject matter of this case are not binding on the judge trying the substantive claim between the first respondent on the one hand and the appellant on the other hand.

[8] SLUHCVAP2011/0030 (delivered 18th September 2012, unreported).

(2) The appellant's second ground of appeal is dismissed, because the order of Edwards J was either a final judgment which could only have been set aside on appeal or it was a defective default judgment which also could only be set aside on appeal and, either way, it could not be set aside (in whole or in part) by a judge of co-ordinate jurisdiction.

(3) The appellant's third ground of appeal is dismissed, because Cottle J, being a judge of co-ordinate jurisdiction with Edwards J, could not set aside her order (either wholly or partially).

(4) The appellant's fourth ground of appeal is allowed only to the extent that any finding made by Georges J in relation to the validity of the appellant's deed of sale is not binding (as between the appellant and the first respondent) on the judge trying the substantive claim.

(5) The appellant's fifth and sixth grounds of appeal are allowed in their entirety, because the learned judge clearly erred in his application of the doctrine of res judicata to the appellant when he was not a party to the proceedings leading to the judgment.

(6) The appellant's seventh ground of appeal is dismissed, because Georges J had good reason to question the effect in law of an order made by Cottle J which he had no jurisdiction to make; the order being one which could only have been made by the Court of Appeal.

[54] I would therefore allow the appeal to the following extent:

(1) The order of Georges J that by virtue of the order entered in claim SLUHCV 2003/0444 on the 10th day of March 2004, which has not been

appealed or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial, is set aside.

(2) The order of Georges J that any further litigation in claim SLUHCV 2003/0444 be stayed until the order of March 10th 2004 is set aside on appeal is itself set aside.

[55] For the sake of completeness, I would dismiss the appeal against the order of Georges J that there is an existing order of the court in claim SLUHCV2003/0444 made on the 10th day of March 2004.

[56] The substantive claim between the appellant and the first respondent and the appellant's ancillary claim against the other respondents is to be set down for trial in the High Court before a different judge from any of those who has previously sat on this case in the High Court.

[57] Costs on this appeal to be costs in the substantive claim.

**Mario Michel**
Justice of Appeal

**Davidson Kelvin Baptiste**
Justice of Appeal

**Gertel Thom**
Justice of Appeal