EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2014/0009

BETWEEN:

MATTHEW THOMAS

Appellant

and

DR. RALPH GONSALVES

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On written submissions:

Ms. Kay Bacchus-Browne for the Appellant
Mr. G. Grahame Bollers for the Respondent

2016: April 6.

Civil appeal – Defamation action commenced in court below by respondent by way of fixed date claim – Appellant's defence struck out in court below and judgment entered for respondent by learned judge – Nature of judgment entered by learned judge – Whether summary judgment or default judgment – Whether judgment entered was irregular – Application made by appellant before different judge to set aside judgment entered against him on basis that it was irregular – Appellant's application dismissed by learned judge – Appeal against decision of second judge – Whether she erred in holding that she had no jurisdiction to set aside judgment made in error by judge of concurrent jurisdiction

The respondent commenced defamation proceedings against the appellant in the court below, alleging slander. The proceedings were brought by way of fixed date claim. The respondent also applied to the court pursuant to rule 26.3 of the Civil Procedure Rules

2000 ("CPR") to have the defence struck out on the basis that it did not disclose any reasonable ground for defending the claim. The matter came up for hearing before Remy J, who struck out the appellant's defence having ruled that it was 'incurably bad, wholly unsustainable' and 'without merit' and proceeded to enter judgment for the respondent for damages to be assessed. On 10th February 2012, damages were assessed in the sum of $155,000.00 and in October 2013, the respondent applied for the appellant to be examined orally as to his means to satisfy the judgment debt. It was only after this examination was conducted in November 2013, that the appellant made an application, in January 2014, to set aside the judgment of Remy J, on the basis that it was irregular – the appellant contended that the learned judge had erred in entering summary judgment on a defamation claim.

The set aside application came up for hearing before a different judge, Henry J [Ag.], who held that she was precluded from setting aside a judgment made in error by a judge of concurrent jurisdiction, and that the matter ought properly to be dealt with on appeal to the Court of Appeal. She dismissed the appellant's application. The appellant appealed to this Court, contending that Henry J [Ag.] erred in refusing to set aside the judgment of Remy J.

Held: dismissing the appeal, and awarding the respondent costs in the sum of $1,500.00, that:

Per Pereira CJ, Thom JA:

1. While it was improper, on the basis of CPR 8.1(4), for the respondent to have commenced the defamation proceedings by way of fixed date claim, the substance of the claim would still have been that of a defamation claim, and accordingly, one that must be subject to the procedure which would govern ordinary claims. The use of a wrong form for bringing a claim does not thereby require a judge to proceed under that basis. The judge has the power under CPR 26.9 to put matters right. Therefore, notwithstanding that the respondent's defamation claim was commenced by fixed date claim form, Remy J was entitled to treat it as an ordinary claim (without expressly stating that she was doing this), because that is what it was, in substance. A claim brought in the wrong form does not make it any different, in substance, to the claim which it is.

   Glenford Rolle v Stephen Lander DOMHCVAP2013/0025A (delivered 20th October 2014, unreported) followed; **Intrust Trustees (Nevis) Limited et al v Naomi Darren** (SKBHCVAP2009/001A, delivered 9th June 2009, unreported) followed; **Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 applied.

2. Treating the claim as an ordinary claim, which it in fact was, save for the defect in form, it would not have been open to Remy J to grant summary judgment on the claim as a defamation claim is not amenable to the summary judgment procedure pursuant to CPR 15.3(d)(ii). However, on striking out the defence, it was amenable to the entry of judgment in default pursuant to CPR 12.5. Accordingly, the judgment entered by Remy J was an interlocutory judgment in default, for damages to be assessed at a later date.

3. Remy J's judgment being a properly entered default judgment for damages to be assessed, Henry J [Ag.] would have had jurisdiction to hear and determine the appellant's application to set it aside. There was nothing irregular about Remy J's judgment. She (Remy J) clearly had jurisdiction to enter the judgment based on the nature of the claim that was before her. Accordingly, Henry J [Ag.] was correct in not setting aside the properly entered judgment of Remy J, although not for the reasons which she stated in her judgment.

   Leymon Strachan v The Gleaner Company Limited and Another [2005] UKPC 33 distinguished.

Per Michel JA (dissenting):

4. CPR 8.1(4) precludes defamation claims from being commenced by a fixed date claim form. Further, since the judgment of Remy J was not one rendered after a trial, but had been entered upon the striking out of the appellant's defence and without any evidence given on the claim, it must have been entered either by default of defence under CPR 12.5, or as a summary judgment under Part 15 of CPR 2000. However, CPR 15.3 precludes summary judgment from being entered on both fixed date claims and claims for defamation, and CPR 12.2(b) precludes a default judgment from being entered on a fixed date claim. Accordingly, the entry of judgment by Remy J on the fixed date defamation claim brought by the respondent against the appellant, without any hearing of the claim, was a judgment made without jurisdiction.

5. When a High Court judge makes an order without jurisdiction it can only be set aside on appeal to the Court of Appeal; a judge of co-ordinate jurisdiction cannot set it aside. Henry J [Ag.] was therefore correct when she found that she was precluded from setting aside the judgment of Remy J, who was a judge of co-ordinate jurisdiction with her, and that the judgment could only be set aside by the Court of Appeal on an appeal against that judgment.

   Leymon Strachan v The Gleaner Company Limited and Another [2005] UKPC 33 applied.

JUDGMENT

[1] **PEREIRA CJ:** This is an appeal which requires the Court to take a closer look at not just the judgment under appeal, but also at another judgment made in these proceedings by a different judge in the lower court. The latter judgment was written by Remy J on 16th November 2009. The instant appeal is against the judgment of Henry J [Ag.], dated 17th July 2014, in which she dismissed the appellant's application made on 15th January 2014 for an order setting aside the judgment of Remy J, and awarded costs to the respondent.

Background to the proceedings

[2] The respondent brought a defamation action against the appellant in the court below, alleging that he had been slandered by words spoken by the appellant over the airwaves. The respondent claimed that the words complained of had been broadcast on radio locally, in Saint Vincent and the Grenadines, and also in Saint Lucia. The proceedings were commenced by fixed date claim form.

[3] The respondent's claim was heard by Remy J, who also had before her an application by the respondent for an order that the appellant's defence be struck out pursuant to rule 26.3 of the **Civil Procedure Rules 2000** ("CPR 2000") on the basis that it did not disclose any reasonable ground for defending the claim.

[4] Remy J struck out the appellant's defence, having ruled that it was 'incurably bad, wholly unsustainable, without merit' and 'an abuse of the process of the Court'. The learned judge then proceeded to enter judgment for the respondent for damages to be assessed. She also granted the respondent an injunction and prescribed costs based on the quantum of damages awarded. Remy J did not

expressly state what was the nature of the judgment being entered and neither did she make reference in her written judgment to the manner in which the claim was commenced by the respondent, that is, by fixed date claim form. The matter then proceeded to assessment, and on 10th February 2012, Master Taylor-Alexander assessed damages in the sum of $155,000.00 and ordered that costs and interest be paid to the respondent.

[5] On 21st October 2013, the respondent applied for the appellant to be examined orally as to his means to satisfy the judgment debt, and this examination was conducted on 26th November 2013. This prompted the appellant's application, in January 2014, to set aside the judgment of Remy J. The application was made on the basis that CPR 15.3(d)(ii) precludes the court from entering summary judgment in defamation cases. The appellant argued that judgment was therefore entered under CPR 26.5 in an instance where there was no right to enter such judgment. He further contended that the import of CPR 26.5 is that a claimant must prove his case even if there is no defence. Accordingly, the judgment of Remy J was irregular and ought to be set aside.

[6] The appellant did not appeal the decision to strike out his defence but rather, admitted in submissions made before Henry J [Ag.] that he accepted that part of Remy J's decision.[1] His principal argument was that Remy J had entered summary judgment on the claim after striking out the defence, and that this was irregular on the basis of CPR 15.3(d)(ii). Remy J's judgment was also irregular on the basis that the proceedings had been commenced by fixed date claim form. The appellant further contended that if the court was purportedly dealing with the claim summarily (under Part 27) then the respondent would still have been required to prove that he was entitled to the relief sought, and a trial of the issues

[1] See para. 14 of the judgment of Henry J [Ag.] in which the learned judge sets out that the appellant stated that he was 'stuck with that decision'.

would have been necessary. He argued that placing reliance solely on the pleadings would not have been proper. Cogent evidence would need to be adduced to prove certain paragraphs of the pleadings, which evidence would need to be tested under cross-examination.

[7] The respondent argued before Henry J [Ag.] that the application to set aside should be dismissed with costs. He submitted that the appellant's contention that an application for summary judgment was made by the respondent under Part 15 of CPR 2000, which deals with summary judgment applications, has no basis in fact or in law. He stated that 'a court can strike out a claim without recourse to Part 15'. He submitted that the proper avenue to be pursued by the appellant for relief was by way of appeal of either the interlocutory order of Remy J made in 2009, or the final order on assessment made in 2012 by Master Taylor-Alexander.

[8] Henry J [Ag.] determined that the decision in the Privy Council case of **Leymon Strachan v The Gleaner Company Limited and Another**,[2] precludes her from setting aside a judgment made in error by a judge of concurrent jurisdiction. Such a judgment can only be set aside by the Court of Appeal. Accordingly, she held that she was unable to set aside the decision of Remy J, and she dismissed the appellant's application.

[9] The appellant filed a notice of appeal on 13th October 2014, in which were set out the following 10 grounds of appeal:

(1) The learned judge erred when she found that since there was no appeal from the decision of Justice Remy when she entered judgment either in default or summary judgment against the defendant the decision in **Strachan v The Gleaner Company & Anor** precluded her from setting aside that decision of Justice Remy for irregularity or illegality.

[2] [2005] UKPC 33.

(2) The learned judge erred by refusing to set aside the illegal and irregular decision of Justice Remy.

(3) The learned judge erred when she held that CPR contains no provisions empowering the court to set aside a summary judgment.

(4) The learned judge erred when she appeared to find that the High Court is not empowered to set aside a summary judgment (illegally/irregularly obtained) see CPR 26.6(2).

(5) The learned judge erred when she stated that CPR 26.6(3) and 26.8 applied to setting aside summary judgment since such rules deal with relief from sanctions and do not apply to summary judgment.

(6) CPR 26.6(3) must be read disjunctively and not conjunctively.

(7) The court has an inherent jurisdiction to set aside an illegal or irregular judgment which amounts to a nullity.

(8) The judgment of Justice Remy is a nullity which can be set aside by a judge of co-ordinate jurisdiction. It is not merely an error whether of law or fact.

(9) The entering of aggravated damages for the claimant based on a plea of malice is unsustainable without a trial. Lennox Linton v Anthony Astaphan.

(10) The assessment of aggravated damages in the sum of $155,000.00 by the court on 10th February 2012 is therefore illegal and irregular.

The issues on appeal

[10] It was clear that there was an issue as to the exact nature of the judgment entered by Remy J, that is, whether it was a summary judgment or a judgment entered in default of filing a defence. The appellant had taken the view that it was the former, while the respondent's view was that it was the latter. Henry J [Ag.] herself, in her written judgment, does not appear to have taken a final position on the exact nature of Remy J's judgment although she did appear to have ruled out the possibility of it being a judgment entered in default of filing a defence by way of comment in a footnote.[3]

[11] Despite the several grounds of appeal formulated, the primary issue which needs to be addressed in this appeal is essentially: what was the nature of the judgment of Remy J? Was it a summary judgment or was it a default judgment? It is by firstly answering this question that it can be determined whether the principles in the Privy Council decision of **Leymon Strachan v The Gleaner Company Limited** were engaged in this matter in the sense that only the Court of Appeal could set aside Remy J's judgment as being irregular or one which she had no jurisdiction to enter and thus, whether Henry J [Ag.] erred in so holding.

[12] Dealing with the above issues calls for a consideration of the substance of the claim. The appellant asserts that this was a defamation claim started by a fixed date claim form and therefore, the judge could have only proceeded on the basis that it was a fixed date claim which is neither amenable to the entry of a default judgment (pursuant to CPR 12.2(b)) nor to the entry of summary judgment (pursuant CPR 15.3(c)).

[3] At para. 27 of Henry J [Ag.]'s judgment, the learned judge, while setting out one of the appellant's arguments which related to the entry of default judgment, stated by way of footnote: 'It is clear that a default judgment was not entered as the judgment [of Remy J] made no reference to entry of a default judgment'.

[13] The difficulty here is that a defamation claim is not a claim to be commenced by way of fixed date claim[4] and therefore the commencement of the defamation claim by the use of a fixed date claim form would have been improper. To my mind, however, that does not convert the substance of the claim to one which engages the fixed date claim procedure. The substance of it is still that of a defamation claim and one that must therefore be subject to the procedure which would govern ordinary claims. The use of a wrong form for bringing a claim does not thereby require a judge to proceed on that basis. There is power under CPR 26.9 to put matters right and surely a claim in the wrong form does not thereby make the claim any different in substance to the claim which it is. There are several cases of this Court which say that you should not place form over substance and these cases are authority for this approach.[5]

[14] When the defence to the claim was struck out by the judge, at no time following the entry of judgment or the assessment carried out by the master (in which the appellant participated), was any issue raised as to the form in which the defamation claim had been commenced. This issue only appears to have been raised for the first time 4 years later, after the assessment had taken place and enforcement proceedings had started. The appellant is now attempting to argue that because the claim had been commenced as a fixed date claim it must be taken that the judgment entered by Remy J must be treated as irregular or one which was made without jurisdiction, having regard to CPR 12.2(b) and CPR 15.3(c).

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[4] CPR 8.1(4) states that a claim form must be in Form 1 (the form applicable to general claims) except in the circumstances set out in CPR 8.1(5), which rule lists the types of claims which ought to be commenced using the fixed date claim form. Defamation proceedings is not one of those listed in CPR 8.1(5).

[5] See, for instance, the case of Intrust Trustees (Nevis) Limited et al v Naomi Darren (SKBHCVAP2009/001A, delivered 9th June 2009, unreported) from our jurisdiction as well as the Privy Council case of Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46.

[15] To my mind, this overlooks the power residing in the judge to have treated the claim for precisely what it was in substance and to overlook the defect in form in which the action was brought. This is the approach taken by the Court in **Glenford Rolle v Stephen Lander**.[6] Even though no mention was made of this in Remy J's judgment, it is only right to assume that the learned judge treated with the claim for what it was in substance rather than being guided by the defect in the form in which the claim was brought and it must be assumed that she simply put matters right. The Court is there to do justice between the parties, not punish litigants who have failed to properly follow all the required procedural steps in seeking to have their matter adjudicated.

[16] On the other hand, if the claim, in substance, was one that could have properly been brought as a fixed date claim and Remy J had entered either a judgment in default or summary judgment, then clearly, she will have erred in so doing by virtue of CPR 12.2(b) and 15.3(c). In short, once a matter is rightly commenced by fixed date claim, neither the default judgment nor summary judgment avenue is open to the parties. For such claims, only a judgment on the merits (after a trial) can be entered, which judgment can only be set aside on appeal to the Court of Appeal. Such was the positon in the case of **Travis Augustin v Choc Estates Limited**,[7] in which proceedings were properly commenced by way of fixed date claim and the judgment entered by the learned judge after summary trial pursuant to CPR 27.2(3) was one which only the Court of Appeal could have set aside. To this extent, the judgment entered on a fixed date claim is similar to summary judgment entered on an ordinary claim, since the latter is also a judgment on the merits which can only be set aside on appeal to the Court of Appeal. In **Travis Augustin**, the error by the judge was in entering judgment for the claimant after

[6] DOMHCVAP2013/0025A (delivered 20th October 2014, unreported).
[7] SLUHCVAP2014/0002 (delivered 9th June 2015, unreported).

striking out the defence without taking evidence in any form whatsoever from the claimant in proof of his claim – in essence, in failing to conduct a trial albeit in a summary way as mandated by CPR 27.2(3) and as explained in this Court's decision in **Richard Frederick et al v Comptroller of Customs et al**.[8] The procedure for entering judgment on a fixed date claim pursuant to CPR 27.2(3) is distinctly different to the default judgment procedure under CPR Part 12 governing ordinary or general claims. It is also a distinctly different procedure to the summary judgment procedure contemplated under CPR Part 15. The legal consequences flowing therefrom also differ. The default judgment is liable to the set aside provisions contained in CPR 13.2 and 13.3, not being a judgment on the merits, and can also be set aside by a judge of concurrent jurisdiction, whereas the judgment entered on the fixed date claim or summary judgment obtained pursuant to CPR Part 15, is a judgment on the merits giving rise to an issue estoppel and is not liable to be set aside under CPR Part 13, but only on an appeal from such judgment. It is thus only in legal consequence that judgment on a fixed date claim and a summary judgment on an ordinary claim share any commonality.

[17] On that basis then, treating the claim as an ordinary claim, which it in fact was, save for the defect in form, it would not have been open to Remy J to grant summary judgment on the claim as a defamation claim is not amenable to the summary judgment procedure pursuant to CPR 15.3(d)(ii). However, on striking out the defence, it was amenable to the entry of judgment in default pursuant to CPR 12.5. Accordingly, I am of the view that the judgment entered by Remy J was an interlocutory judgment in default, for damages to be assessed at a later date. The damages were in fact assessed and indeed, enforcement proceedings

[8] SLUHCVAP2008/0037 (delivered 6th July 2009, unreported). See para. 46 of the judgment in Richard Frederick et al v Comptroller of Customs et al.

were later commenced, all over a period of 4 years. No appeal was made against the decision striking out the defence or indeed against the entire decision of Remy J which included entering judgment in favour of the respondent. There was no appeal against the assessment conducted some 2 years later. It is only after steps were taken to enforce the judgment, that the appellant sought to apply, now before Henry J [Ag.], to set aside the earlier judgment of Remy J on the basis that it was irregular, or one made without jurisdiction.

[18] Having concluded that Remy J's judgment was nothing more than a default judgment under CPR 12.5 for the reasons advanced, Henry J [Ag.] would have had jurisdiction to hear and determine the application to set aside the said default judgment and to my mind, the principles espoused in the case of **Leymon Strachan v The Gleaner Company Limited** are not engaged here at all. There is nothing irregular about Remy J's judgment, she having entered, in effect, a default judgment for damages to be assessed. She clearly had jurisdiction to enter such a judgment based on the nature of the claim.

[19] However, the defence having been struck out under CPR 26.3(1), it would be difficult to conceive on what basis the appellant would have been able to persuade the learned judge that he had a real prospect of successfully defending the claim unless he was able to put forward a wholly new defence to the claim. This is one of the hurdles he would be required to overcome if seeking to set aside a regularly obtained judgment, having regard to the fact that the defence was struck out as having no realistic prospect in defending the claim, which decision must be taken to be accepted, having not been appealed.

[20] Unsurprisingly therefore, the appellant has sought to attack the judgment as being one which is irregular in the sense that the learned judge either exceeded her jurisdiction or had no jurisdiction to enter the judgment which she did. For the

reasons which have been set out above, there is no basis for holding that the learned judge either lacked jurisdiction or exceeded her jurisdiction in giving judgment in default, there being no defence to the claim at that point.

[21] This Court, in considering whether any proper basis had been put forward for setting aside the default judgment would be drawn ineluctably to the conclusion that no proper basis or reason had been put forward to find either that the judgment was an irregular one which was required to be set aside under CPR 13.2, or that any basis had been put forward for the favourable exercise of the discretionary power conferred under CPR 13.3. No material whatsoever was put forward by way of satisfying the cumulative requirements of sub-rule 13.3(1) paragraphs (a) to (c). In any event, satisfying those requirements would have no doubt presented an insurmountable hurdle for the reason to which I have alluded, coupled with the lengthy delay over which period the matter proceeded to assessment in which the appellant fully participated and eventually, to the stage of engaging the court's powers for enforcement. The appellant has not sought to engage the 'exceptional circumstances' head now contained in sub-rule (2) of rule 13.3 and accordingly this need not be addressed. Accordingly, I would uphold the order of Henry J [Ag.] in not setting aside the judgment but not for the reasons which she gave.

[22] For these reasons, I would dismiss the appeal. I would award costs to the respondent fixed in the sum of $1,500.00.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom

Justice of Appeal

[23] **MICHEL, JA**: This is an appeal against the judgment of Henry J [Ag.], delivered on 17th July 2014, in which the learned judge dismissed an application by the appellant to set aside an earlier judgment of Remy J.

[24] The judgment of Remy J, dated 16th November 2009, struck out the appellant's defence to a defamation action brought against him by the respondent and entered judgment for the respondent for damages to be assessed, an injunction and costs. On 10th February 2012, Master Taylor-Alexander assessed the damages payable by the appellant to the respondent in the amount of $155,000.00, together with interest and costs. Neither the summary judgment of Remy J nor the judgment on assessment of Master Taylor-Alexander was appealed. Then, on 21st October 2013, the respondent applied for an order for oral examination of the appellant consequent on his non-payment of the judgment debt, and the examination was done by Master Actie [Ag.] on 26th November 2013. Only then was the appellant aroused, and on 15th January 2014 he made the application to set aside the judgment of Remy J over four years after it was rendered and almost two years after the damages were assessed.

[25] In the submissions made in the application before Henry J [Ag.], the appellant conceded that Remy J had jurisdiction to strike out the appellant's defence and her order to this effect was not challenged. It is contended on his behalf, however, that the learned judge did not have jurisdiction to enter judgment for the respondent without more, since summary judgment is not available on a fixed date claim or a defamation claim and the respondent's claim in the court below was both a fixed date claim and a claim in defamation, and no evidence was received by Remy J to prove the respondent's defamation claim against the appellant,

which would be necessary if the claim was being determined in a summary manner, though not by way of summary judgment.

[26] The respondent, on the other hand, submitted that the judgment of Remy J was not a summary judgment entered under Part 15 of the **Civil Procedure Rules 2000** ("CPR") and that the appellant's defence was struck out pursuant to rule 26.3 of the CPR, which deals with the striking out by the court of statements of case. It was contended on behalf of the respondent that any complaint which the appellant had with the judgment of Remy J should have been addressed by an appeal to the Court of Appeal against her judgment and not by an application to the High Court to set aside her judgment.

[27] In her judgment delivered on 17th July 2014, Henry J [Ag.] determined that, in accordance with the case of **Leymon Strachan v The Gleaner Company Limited and Another**,[9] a judge could not set aside a judgment made in error by a judge of co-ordinate jurisdiction and she accordingly dismissed the application to set aside the judgment of Remy J.

[28] In his notice of appeal filed on 13th October 2014, pursuant to an order dated 23rd September 2014 granting leave to appeal, the following grounds of appeal were advanced by the appellant:

(1) The learned judge erred when she found that since there was no appeal from the decision of Justice Remy when she entered judgment either in default or summary judgment against the defendant the decision in **Strachan v The Gleaner Company & Anor** precluded her from setting aside that decision of Justice Remy for irregularity or illegality.

[9] [2005] UKPC 33.

(2) The learned judge erred by refusing to set aside the illegal and irregular decision of Justice Remy.

(3) The learned judge erred when she held that CPR contains no provisions empowering the court to set aside a summary judgment.

(4) The learned judge erred when she appeared to find that the High Court is not empowered to set aside a summary judgment (illegally/irregularly obtained) see CPR26.6(2).

(5) The learned judge erred when she stated that CPR 26.6(3) and 26.8 applied to setting aside summary judgment since such rules deal with relief from sanctions and do not apply to summary judgment.

(6) CPR 26.6(3) must be read disjunctively and not conjunctively.

(7) The court has an inherent jurisdiction to set aside an illegal or irregular judgment which amounts to a nullity.

(8) The judgment of Justice Remy is a nullity which can be set aside by a judge of co-ordinate jurisdiction. It is not merely an error whether of law or fact.

(9) The entering of aggravated damages for the claimant based on a plea of malice is unsustainable without a trial. Lennox Linton v Anthony Astaphan.

(10) The assessment of aggravated damages in the sum of $155,000.00 by the court on 10th February 2012 is therefore illegal and irregular.

[29] Ground 1, which is the nub of this appeal, challenges the finding by Henry J [Ag.] that since there was no appeal from the decision of Remy J, then Henry J [Ag.] was precluded by the decision of the Privy Council in **Leymon Strachan v The Gleaner Company Limited** from setting aside the judgment of Remy J for irregularity or illegality.

[30] There is, in my view, no doubt that Remy J erred when on 16th November 2009, having struck out the appellant's defence in a defamation action brought by fixed date claim, she proceeded to enter judgment for the respondent for damages to be assessed, an injunction and costs.

[31] On the facts, the judgment of Remy J was not one rendered after a trial of the suit brought by the respondent against the appellant, but was entered upon the striking out of the appellant's defence and without any evidence given on the claim. The judgment must therefore have been one entered by default of defence under rule 12.5 of CPR, the appellant's defence having been struck out by the judge, or as a summary judgment under Part 15 of CPR. Rule 12.2(b) of CPR, however, expressly provides that a claimant may not obtain default judgment if the claim is a fixed date claim, while rule 15.3 provides that summary judgment may not be given in proceedings by way of fixed date claim or proceedings for defamation. As indicated, the claim before Remy J was both a fixed date claim and a defamation claim.

[32] In any event, rule 12.5 of CPR empowers the court office and not a judge of the court to enter judgment for failure to defend if the defendant has not filed a defence to the claim or the defence has been struck out. And, if the judgment was entered under rule12.5 then it follows that it could be set aside by any judge under rule 13.2 or 13.3 and Henry J [Ag.] would have erred in her ruling that the judgment could not be set aside by a judge of co-ordinate jurisdiction.

[33] The entry of judgment by Remy J on the fixed date defamation claim brought by the respondent against the appellant, without any hearing of the claim, was therefore a judgment made without jurisdiction.

[34] Faced with a judgment made against him by a judge without jurisdiction to do so, the appellant should have appealed against the decision to the Court of Appeal, which alone could have set aside the judgment.

[34] In the Jamaican case of **Leymon Strachan v The Gleaner Company Limited**, the Privy Council held that an order made by a judge without jurisdiction to make the order stands until it is set aside by the Court of Appeal. In paragraph 28 of the judgment, Lord Millett – delivering the judgment of their Lordships – stated that:

> "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."

[35] In paragraph 32 of the judgment, Lord Millett stated:

> "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."

[36] As with the Supreme Court of Jamaica, so too with the Eastern Caribbean Supreme Court, that when a High Court judge makes an order without jurisdiction it can only be set aside on appeal to the Court of Appeal and a judge of co-ordinate jurisdiction cannot set it aside.

[37] Henry J [Ag.] was therefore correct when she explicitly stated in her judgment that the Privy Council decision in **Leymon Strachan v The Gleaner Company Limited** answered in the negative the question whether a judge can set aside a judgment made in error by a judge of concomitant jurisdiction. She was also correct when she found that, in accordance with the decision of the Privy Council in **Leymon Strachan v The Gleaner Company Limited**, she was precluded from setting aside the judgment of Remy J, who was a judge of co-ordinate jurisdiction with her, and that the judgment could only be set aside by the Court of Appeal on an appeal to this Court against that judgment. No such appeal having been instituted by the appellant in this case, who was a defendant in the case before Remy J, the judgment of Remy J dated 16th November 2009 stands and ground 1 of the appellant's grounds of appeal is dismissed.

[38] Of course, if Remy J's judgment had been entered under Part 12 of CPR then it could have been set aside under Part 13 and Henry J [Ag.]'s ruling as to her inability to set aside the judgment would have been erroneous.

[39] Having already found that Henry J [Ag.] was precluded from setting aside the judgment of Remy J, ground 2 of the appellant's grounds of appeal also cannot stand and is accordingly dismissed.

[40] The dictum by Henry J [Ag.] that 'the CPR contains no provisions empowering the court to set aside a summary judgment'[10] appears to be correct. Neither of the provisions referred to by the appellant in his submissions on appeal empowers the

[10] See para. 24 of the judgment of Henry J [Ag.].

court to set aside a summary judgment. Rule 26.6 of CPR provides for the setting aside of a judgment entered under rule 26.5, which rule deals specifically with judgments resulting from non-compliance with "unless orders". Rules 13.2 and 13.3 provide for the setting aside of judgments entered under Part 12 of CPR, which deals specifically with judgments obtained in default of the filing of an acknowledgment of service or defence. None of these provisions empower the court to set aside a summary judgment and the dictum of the learned judge is therefore correct. Ground 3 of the appellant's grounds of appeal is accordingly dismissed.

[41] Ground 4 of the appellant's grounds of appeal has been addressed in dealing with grounds 1 and 2 and, consistent with the treatment of grounds 1 and 2 of the grounds of appeal, ground 4 is also dismissed.

[42] As to ground 5 of the appellant's grounds of appeal, it is to be noted that the learned judge ruled that a summary judgment could not be set aside by a judge of co-ordinate jurisdiction. She however went on to state that '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(3) … and 26.8 of CPR'.

[43] This appears to be an eminently sensible ruling by the learned judge, since rule 26.6(3), if interpreted disjunctively (as urged by the appellant) may be the only provision, if provision there is, on the basis of which the court may be able to set aside a summary judgment obtained after striking out a party's statement of case. In this event, as the learned judge rightfully stated, and in accordance with the express terms of rule 26.6(3), rule 26.8 of CPR must be applied. Ground 5 of the appellant's grounds of appeal is accordingly dismissed.

[44] As to ground 6 of the appellant's grounds of appeal, a disjunctive reading of sub-rule (3) of rule 26.6 may be permissible, but it would not take away from the principle emanating from **Leymon Strachan v The Gleaner Company Limited** that it is the Court of Appeal and not the High Court which alone can set aside a judgment of the High Court made without jurisdiction to make it. In so far as ground 6 was put forth as a basis upon which the judgment of Henry J [Ag.] could be overturned, this ground too is dismissed.

[45] As to grounds 7 and 8 of the appellant's grounds of appeal, it is a correct statement of law that the High Court has an inherent jurisdiction to set aside a judgment which is a nullity, indeed the court can simply proceed on the basis that it is non-existent, since a judgment which is a nullity does not exist as a matter of law. This is different, however, from a judgment entered or rendered by a court without the jurisdiction to do so, which – according to the Privy Council in **Leymon Strachan v The Gleaner Company Limited** – is not wholly without effect and can only be set aside on appeal by the Court of Appeal.

[46] The difference between the two types of orders – the one made by a court in excess of jurisdiction because, on the facts, it was not open to it to make that order, and the one made by a court which simply had no power to make such orders, the power to do so being located elsewhere – was brought out by the nineteenth century English Court of Appeal decision in the case of **In re Padstow Total Loss and Collision Assurance Association**.[11] In that case, an order was made in the High Court to wind up a company in circumstances where the court had no jurisdiction to do so, although the court had jurisdiction, on the appropriate facts, to make a winding up order. The Court of Appeal held that the order of the High Court, though made in excess of jurisdiction on the facts of the particular

[11](1882) 20 Ch D 137.

case, was not a nullity and could only therefore be set aside by the Court of Appeal.

[47] A good analogy may be the difference between a transaction that is void and one that is voidable, with the former being simply a nullity capable of being so treated, and incapable of producing any legal consequences, and the latter being valid unless invalidated, and producing legal consequences whilst it subsists. The judgment of Remy J fell into the category of a voidable rather than a void order, which could only be voided by a superior court, and so Henry J [Ag.], as a judge of co-ordinate jurisdiction, had no power to set it aside. This then disposes of both grounds 7 and 8, which are accordingly dismissed.

[48] Grounds 9 and 10 of the appellant's grounds of appeal arise from an order made by Master Taylor-Alexander on an assessment of damages, the merits of the making of which could only be pronounced upon by the Court of Appeal on an appeal against the assessment order. Grounds 9 and 10 are accordingly dismissed.

[49] All of the appellant's grounds of appeal having been dismissed, the appeal is itself dismissed. The respondent not having filed any submissions in opposition to the appeal, no order is made as to costs.

Mario Michel
Justice of Appeal