

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

MONTSERRAT

MNIHCVAP2021/0010

BETWEEN:

MARY HOGAN

Appellant

and

WILSTON JOHNSON

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. John Carrington

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant
Dr. David Dorsett for the Respondent

2022: February 10.

Interlocutory appeal — Default judgment — Default judgment entered by master on claim for ‘some other remedy’ — Default judgment set aside by a different master for failure to request default judgment in Form 7 — Issue of failure to request default judgment in Form 7 raised by master of own motion — Natural justice — Whether master breached natural justice in setting aside default judgment without hearing from parties on issue raised of own motion — Whether failure to file a request for default judgment in Form 7 is a proper basis for setting aside judgment — Rules 12.5, 12.7 and 13.2 of the Civil Procedure Rules 2000 — Decision of Court of Appeal in Lux Locations Ltd. v Yida Zhang — Co-ordinate jurisdiction — Whether master erred in setting aside default judgment in circumstances where judgment was entered by another master of co-ordinate jurisdiction

REASONS FOR DECISION

- [1] **PEREIRA CJ:** On 10th February 2022, we allowed an appeal by the appellant, Mary Hogan (“Ms. Hogan”), against the decision of the learned master delivered on 4th

November 2021, setting aside a judgment entered in default of defence. We accordingly restored the default judgment entered against the respondent, Wilston Johnson (“Mr. Johnson”), and set aside orders made by the master, specifically those at paragraphs 14(1) (b), (c), (d) and (e) of the master’s decision in their entirety. We also awarded Ms. Hogan costs on the application in the court below and costs on the appeal. Before the hearing of the substantive appeal, we heard an application by Ms. Hogan for an extension of time to file a chronology of events, the record of appeal and supplemental written submissions on the appeal as well as an application by Mr. Johnson for the transcript of the hearing before the master on 4th November 2021 to be included in the record of appeal. There being no opposition to these applications or discernible prejudice to either party, we granted the extensions of time as prayed. We had however promised to reduce our reasons for the decision on the substantive appeal to writing. We now do so.

Background

- [2] By way of background summary, for placing the matters in context, on 21st June 2018, Ms. Hogan filed a claim against Mr. Johnson seeking declarations, an injunction and other relief in relation to a right of way over Mr. Johnson’s property. The crux of Ms. Hogan’s claim is that in order to access her property, which is surrounded by Mr. Johnson’s two properties, she requires a right of way over one of Mr. Johnson’s properties adjoining her property and that he refrains from interfering with her use of the right of way.

- [3] On 11th July 2018, Mr. Johnson acknowledged service of the claim. Instead of filing a defence, on 28th September 2018, he filed an application to strike out the claim (“the first application to strike”). Before the first application to strike was heard, Ms. Hogan amended her statement of claim on 7th December 2018.

- [4] On 30th January 2019, the first application to strike came on for hearing before Drysdale M. The master dismissed the application on the basis of a concession by learned counsel for Mr. Johnson that the application was otiose considering that Ms.

Hogan had amended her statement of claim. Drysdale M also referred the parties to mediation. The parties' efforts at mediation were unsuccessful and they returned to court for further directions on 17th April 2019. On that date, Drysdale M ordered that Mr. Johnson file a defence by 16th May 2019.

[5] On 13th May 2019, instead of filing a defence to the claim, Mr. Johnson filed an application to strike out Ms. Hogan's amended statement of claim ("the second application to strike"). This was followed by an application filed by Ms. Hogan on 24th June 2019 for default judgment or alternatively, an unless order. The second application to strike came on for hearing on 24th October 2019 and was dismissed by Drysdale M as being without merit.

[6] On 29th November 2019, Ms. Hogan amended her application for default judgment to include an application for wasted costs. A few days later, on 2nd December 2019, Mr. Johnson filed a defence to the claim. The defence was not accompanied by an application for an extension of time for filing the defence. On 23rd January 2020, Ms. Hogan's amended application for default judgment or an unless order and for wasted costs came on for hearing. Drysdale M, upon hearing the submissions of the parties, entered default judgment with the terms of the judgment to be determined. However, she declined to award Ms. Hogan wasted costs. At the hearing to determine the terms of the judgment, the court gave directions and fixed a date for the assessment of damages.

The Application before the Court Below

[7] On 6th June 2021, Mr. Johnson filed another application to strike out Ms. Hogan's amended statement of claim as well as to set aside the default judgment under rule 13.2 of the **Civil Procedure Rules 2000** ("CPR"). The application was based on two main grounds. The first ground, in essence, was that the filing of the first application to strike prevented Ms. Hogan from amending her pleadings without leave of the court and no such leave having been sought or obtained by Ms. Hogan, the amended statement of claim was a nullity. The second ground advanced was that Mr. Johnson

was not required to file a defence as the filing of the second application to strike stopped the time for filing a defence from running pending its determination. He argued that the default judgment should be set aside on that basis. The application to strike out Ms. Hogan's amended statement of claim and to set aside the default judgment came on for hearing before a different master of the High Court on 23rd September 2021.

Decision of the Court Below

- [8] By a written decision delivered on 4th November 2021, the learned master dismissed the application to strike but set aside the default judgment. She accordingly granted Mr. Johnson leave to file and serve a defence and Ms. Hogan liberty to file and serve a reply. On the application to strike out, the master agreed that the amended statement of claim having been filed without leave of the court, in circumstances where an application to strike had been filed, would be a nullity. However, she found that this was, in the circumstances, no longer in issue in light of an earlier concession by Mr. Johnson when the point was raised during the hearing of the first application to strike. The master further considered it to be inappropriate for this issue to be raised some two and a half years later in the proceedings. She surmised that the proper recourse for Mr. Johnson would have been to appeal against the decision on the first application to strike instead of filing the second application to strike and accordingly dismissed it.
- [9] On the application to set aside the default judgment, the master in purported reliance on the Court of Appeal decision of **Lux Locations Ltd. v Yida Zhang**¹ and without hearing the parties on the issue, found that Ms. Hogan's failure to file a request for default judgment in Form 7 (rather than filing an application for default judgment) meant that the conditions in CPR 12.5 were not satisfied. The master therefore concluded that she was compelled to set aside the default judgment.

¹ ANUHCVP2020/0025 (delivered 11th January 2021, unreported).

The Appeal

[10] Ms. Hogan, being dissatisfied with the learned master's decision to set aside the default judgment, appealed to this Court. The notice of appeal outlines some eleven grounds of appeal which challenges several of the master's findings of law. Notwithstanding these grounds of appeal, two broad issues arose for this Court's determination. The first issue concerned whether the master erred in setting aside the default judgment on the basis of a point which was neither raised nor canvassed by the parties at the hearing ("the Natural Justice Issue"). The second issue, which we considered to be the nub of this appeal, concerned whether the master could have properly set aside the default judgment on the sole basis of Ms. Hogan's failure to file a request for default judgment in Form 7 ("the Form 7 Request Issue").

[11] We first considered the Natural Justice Issue.

Issue 1 – The Natural Justice Issue Submissions on behalf of the parties

[12] Learned counsel for Ms. Hogan, Mr. Jean Kelsick, submitted that the learned master erred in setting aside the default judgment on the basis of a point which was not canvassed by the parties nor raised by the master in the court below. Mr. Kelsick reminded the Court that Ms. Hogan's failure to file a request for default judgment in Form 7 was not a ground relied on by Mr. Johnson in his application to set aside the judgment. He contended that, by failing to invite and consider submissions from the parties on that issue before setting aside the default judgment, the master denied Ms. Hogan natural justice and the appeal should therefore be allowed.

[13] In response learned counsel for Mr. Johnson, Dr. David Dorsett, conceded that the master had in fact determined the application on the basis of a point which was not canvassed before her. Dr. Dorsett however argued that, if the Court were to find that the rules of natural justice were not observed by the master, the application should be remitted to the court below for the parties to make submissions on the issue of the appropriate form of application for default judgment.

Discussion

- [14] This is a short point. It readily appears, and is not disputed, that the learned master set aside the default judgment on the basis of a point which was not canvassed before her. It is a well-settled principle that a judicial officer should refrain from seeking to resolve an issue which did not arise by way of the pleadings without the benefit of arguments on the point. This was made plain by this Court in **George W. Bennett Bryson's & Co. Ltd trading as Bryson's Shipping v George Purcell trading as Hortico Landscaping and Nursery**.² In this case, the respondent had brought a claim in bailment against the appellant arising from the destruction of the respondent's cargo which the appellant had agreed to transport to Antigua. At the trial, the judge found that the appellant was liable for breach of contract, which was not a cause of action pleaded by the respondent. The trial judge also found that, as a result of the appellant's breach of contract, the respondent was entitled to damages. The judge considered it to be unnecessary to make a specific finding on the issue of bailment. The appellant appealed against the judge's decision. On the issue of the judge's decision to make a finding based on a cause of action which was not pleaded, Blenman JA at paragraphs 34 and 36 of the judgment expressed that:

"34. The learned trial judge's failure to properly deal with the matter as pleaded and to instead base his decision on a matter that was not pleaded was indeed a grave error that resulted in a miscarriage of justice. The dicta of Lord Diplock in **Hadmor Productions Limited and Others v Hamilton and Another** [1983] 1 AC 191, 233] is very instructive on this point:

'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is'.

36. We are fortified in this position by an article written by Sir Jack Jacob in the law journal *Current Legal Problems* entitled "**The Present Importance of Pleadings**" where at pages 174-175 the author stated that:
- '...The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate**

² ANUHCVP2011/0023 (delivered 28th February 2018, unreported).

upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties...**Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.** The court does not provide its own terms of reference or conduct its own enquiry into the merits of the case, but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings’.” (Emphasis added)

Additional support for this proposition can be gleaned from the decision of this Court in **South East Asia Energy Holding AG v Hycarbex-American Energy Inc.**,³ where Blenman JA expressed that it was undesirable for the court to decide an issue which was neither raised on the pleadings nor argued before it.

[15] It appears from the principles stated in the cases above that the role of the court is circumscribed in relation to raising issues of its own motion for consideration. These principles are clearly incorporated in CPR 26.2 which provides that ‘where the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representation’ – in essence to be heard thereon. A judge or master should identify the issues in dispute which arise on the pleadings or as the basis of an application and determine only those issues. Where a new issue is raised during or after the conclusion of a hearing, the judge or master is obliged to afford the parties an opportunity to make submissions before adjudicating upon that issue. Failing to do so would be tantamount to not hearing the party who is aggrieved by the decision at all and may amount to a denial of justice.

[16] It is undisputed that the issue of Ms. Hogan’s form of application was not raised as a ground in Mr. Johnson’s set aside application or by the master at any time during or after the hearing of the application. In light of the principles set out above, we

³ SKBHCVAP2016/0015 (delivered 4th December 2017, unreported) at para. 34.

were satisfied that the master fell into error when she set aside the default judgment, without first considering submissions from the parties on the issue of Ms. Hogan's failure to apply for default judgment by way of a Form 7 request. The master was obliged to raise the issue with the parties before adjudicating upon the application. This obligation was even more critical in this case since the very issue was, in the master's view, determinative of the application. In failing to hear the parties on this point and proceeding to decide against Ms. Hogan, the master denied Ms. Hogan natural justice. Accordingly, we were satisfied that the master's decision could not properly stand. We however declined Dr. Dorsett's invitation to remit the application to the court below for rehearing in light of our findings on the second issue on appeal.

Issue 2 – The Form 7 Request Issue

Submissions on behalf of the parties

- [17] On this point, Mr. Kelsick submitted that the master erred in setting aside the default judgment because of Ms. Hogan's failure to file a request for default judgment in Form 7. He contended that the master wrongly relied on **Lux Locations** as authority for the proposition that the failure to file a request in Form 7 is a basis on which a default judgment could be set aside. He posited that there is a distinction between a default judgment granted by the court because of a defendant's failure to comply with a court order directing that defendant to file a defence by a specified date, as in the case at bar, and a default judgment entered due to the effluxion of time under the CPR, as was the case in **Lux Locations**. As such, he argued, **Lux Locations** did not avail Mr. Johnson.
- [18] Mr. Kelsick further contended that if the Court were minded to hold that **Lux Locations** applies where the time for filing a defence is governed by a court order, then the Court should find that the master erred by failing to treat Ms. Hogan's application for a default judgment as a Form 7 request. He stated that the application in nature and substance was effectively the same as a request in Form 7 and reminded that the court is generally reluctant to fault a litigant for using the

wrong form. Mr. Kelsick relied on the decision of this Court in **Matthew Thomas v Dr. Ralph Gonsalves**⁴ in support of this submission.

[19] Mr. Kelsick further suggested that in any event the court office could not have entertained a request in Form 7 since at the time the application for default judgment was made, Ms. Hogan's claim was being case managed by Drysdale M. He stated that the court office could not properly interpose itself when the court is actively managing a claim. Mr. Kelsick further posited that it was not open to the learned master to set aside the default judgment for the failure to file a request in Form 7 where the default judgment was entered by a master of co-ordinate jurisdiction. He argued that the principles in **Leymon Strachan v The Gleaner Company Limited and another**⁵ were not applicable in this case and the master therefore had no jurisdiction to set it aside. Mr. Kelsick accordingly urged the Court to find that the master erred in setting aside the default judgment because of Ms. Hogan's failure to file a request for default judgment in Form 7.

[20] In response, Dr. Dorsett argued that based on **Lux Locations** a claimant who wishes to obtain a default judgment on a claim 'for some other remedy' must first file a request in Form 7 at the court office since the entry of default judgment is an administrative act and not a judicial one. He contended that, following **Lux Locations**, the master quite properly found that Ms. Hogan was required to file a request for default judgment in Form 7 and that, Ms. Hogan having not done so, the default judgment could be set aside on that basis. While Dr. Dorsett conceded that this issue was not raised during the hearing of the application for default judgment, he contended that the master was bound to follow the decision of this Court in **Lux Locations**.

[21] Dr. Dorsett further contended that because there was non-compliance with CPR 12.7, the default judgment was irregular and it was therefore open to the learned

⁴ SVGHCVP2014/0009 (delivered 6th April 2016, unreported).

⁵ [2005] 1 WLR 3204.

master to set aside the default judgment entered by Drysdale M. He relied on the **Leymon Strachan** decision in support of his submission. He posited that in the circumstances of the case the master did not err in setting aside the default judgment.

Discussion

- [22] The starting point in our analysis was to consider this Court's judgment in **Lux Locations**, which Dr. Dorsett asserted is authority for the proposition that the failure to file a request for default judgment in Form 7 is a basis upon which a default judgment can be set aside.

The Lux Locations Decision

- [23] In **Lux Locations**, the respondent Mr. Yida Zhang filed a claim against Lux Locations Ltd., seeking to set aside a consent order entered into by the parties. Mr. Zhang served the claim form and the statement of claim on the registered office of Lux Locations Ltd. Lux Locations Ltd. however failed to file a defence within the time prescribed under the CPR. As a result, Mr. Zhang made a request in Form 7 for judgment in default of defence. Upon making this request, the court office informed Mr. Zhang that he was required to make an application for default judgment pursuant to CPR 12.10 (4) and (5). Mr. Zhang made the application. Lux Locations Ltd. subsequently filed a defence, which was followed by an application seeking an extension of time to file the defence as well as an order striking out Mr. Zhang's statement of claim and summary judgment. The judge entered default judgment on Mr. Zhang's application and dismissed Lux Locations Ltd.'s application.
- [24] Without first seeking to set the default judgment aside, Lux Locations Ltd. appealed against the judge's decision entering default judgment and dismissing its application. Mr. Zhang applied to strike out the appeal. He submitted that the Court had no jurisdiction to hear the appeal because where a default judgment has been granted and no steps have been taken to have it set aside, the only options available to a defendant are those rights outlined in CPR 12.13 and seeking to set aside the

default judgment under CPR Part 13. The Court agreed with Mr. Zhang's submission and struck out the notice of appeal. The Court, having opined that the entry of a default judgment involved an administrative act, observed that a defendant who is dissatisfied with a default judgment must first seek to set it aside in the court below pursuant to CPR Part 13 rather than engage the appeal process. At paragraph 30 of the judgment, the Court of Appeal went on to state as follows:

"The effect of rules 12.7, 12.4 or 12.5, 12.10 (4) and (5) read conjointly with rule 12.13(b) is that a claimant who wishes to obtain judgment in default where the claim is for 'some other remedy' must file a request in Form 7 at the court office. If the conditions outlined in rules 12.4 or 12.5 of the CPR are satisfied, the court office must enter judgment in default with the terms of the judgment to be determined by the court. The claimant must then make an application to the court to determine the terms of the judgment in accordance with rules 12.10 (4) and (5). The application must be supported by evidence on affidavit. The court will then determine the terms of the judgment, in other words, the relief(s) to be granted. In considering the application, the court may hear the defendant."

- [25] Dr. Dorsett strenuously urged this Court to find, in reliance on paragraph 30 of **Lux Locations**, that it must be inferred that where a party has failed to file a Form 7 request but instead files an application for default judgment, then the resulting default judgment is irregular and must be set aside. Having considered the judgment, we did not agree with Dr. Dorsett. **Lux Locations** expresses no such proposition and neither should such be implied on the dictum expressed *obiter* in paragraph 30. It must be borne in mind that this was not the issue before the Court of Appeal in **Lux Locations**. The sole issue which arose for determination in **Lux Locations** concerned the avenues available to a defendant against whom default judgment has been entered. Accordingly, the Court's guidance on the procedure to be followed by a claimant to obtain default judgment cannot be considered as part of the *ratio decidendi* of the case and is merely *obiter*. In any event, as made plain earlier, there is nothing in the Court's *obiter* statements which can be properly interpreted as stating that a failure to file a request for judgment in Form 7 is a basis on which a default judgment can be set aside.

[26] In addition, the relevant provisions of CPR Parts 12 and 13 do not support the interpretation accorded by Dr. Dorsett. The rules brought into sharp focus in this appeal were CPR 12.5, 12.7, and 13.2. CPR 12.5 sets out the conditions to be satisfied before judgment for failure to defend a claim can be properly entered. The rule mandates the court office, at the request of the claimant, to enter judgment for failure to defend once certain conditions are satisfied. CPR 12.7 addresses the procedure for obtaining default judgment. It provides that a claimant applies for default judgment by filing a request in Form 7. CPR 13.2 states that the court must set aside a default judgment entered under Part 12 if the judgment was wrongly entered where, in the case of a judgment for failure to defend, any of the conditions in CPR 12.5 was not satisfied. These conditions are as follows:

- “(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 (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or
 - (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
 - (iii) satisfied the claim on which the claimant seeks judgment; and
- (d) (if necessary) the claimant has the permission of the court to enter judgment.”

[27] On a conjoint reading of CPR 12.5, 12.7 and 13.2, we were fortified in our view that the failure to obtain default judgment by way of a request in Form 7 cannot be a basis for setting aside a default judgment. While CPR 12.7 provides that a request for default judgment may be made in Form 7, the rule is not couched in mandatory terms. The rule also does not contain an express sanction for the failure to comply with its provisions. It is well-settled that the court should not imply a sanction where no sanction has been expressly specified by a rule. As much was said by the Privy

Council in **The Attorney General of Trinidad and Tobago v Keron Matthews**⁶ and quite recently by this Court in **Antigua Flight Training Center v Deidre Pigott Edgecombe and Nordel Edgecombe**.⁷ Had it been the intention of the drafters of the CPR to impose a sanction for non-compliance with CPR 12.7, the rule would have clearly said so. In essence, a finding by this Court that the failure to file a request in Form 7 is a ground for setting aside a default judgment has the unavoidable effect of implying a sanction into CPR 12.7 when no such sanction is imposed by the rule.

- [28] In any event, a default judgment can only be set aside under CPR 13.2 where any of the conditions in CPR 12.5 has not been met. There is absolutely nothing in the CPR 12.5 checklist of conditions which speaks to the claimant filing a request in Form 7 and therefore it would be quite wrong for the Court to somehow interpose the provisions of CPR 12.7 into CPR 12.5. Had the rule-makers intended for the filing of a request in Form 7 to be a precondition for obtaining default judgment, it would have, quite easily, been included in CPR 12.5.
- [29] There is also no basis for contending that any of the conditions in CPR 12.5 had not been satisfied. It is clear that Mr. Johnson had acknowledged service of the claim and had failed to file a defence within the time ordered. We found no merit in Dr. Dorsett's submission that Mr. Johnson was not required to file a defence as the filing of the second application to strike on 13th May 2019 stopped the time for filing a defence from running. It must be borne in mind that Drysdale M had ordered Mr. Johnson to file a defence by 19th May 2019. Instead, he filed a second application to strike out on 16th May 2019. Following the decision in **The Attorney General of Saint Lucia v Darrel Montrope**,⁸ while it is true that the filing of the second application to strike stopped the time for filing a defence from running, the time continued to run when the second application was dismissed on 24th June 2019. From 24th June 2019, Mr. Johnson would have had three days remaining (the period

⁶ [2011] UKPC 38.

⁷ ANUHCVP2020/0017 (delivered 22nd October 2021, unreported).

⁸ SLUHCVP2019/0021 (delivered 9th July 2020, unreported).

between the filing of the second strike out application on 16th May 2019 and the deadline for filing a defence on 19th May 2019) to file a defence. It is not the position in law that, upon the dismissal of the second application to strike, Mr. Johnson would have been allotted a further full twenty-eight day period under the CPR for filing a defence. In any event, even if this were the case, Mr. Johnson did not file a defence until several months later on 2nd December 2019, well past the twenty-eight day period ordinarily given by the CPR. Mr. Johnson had neither sought nor been granted an extension of time within which to file a defence. The defence, having been filed out of time, was irregular unless and until cured by the grant of an extension of time. It could not therefore be properly contended that the CPR 12.5 conditions had not been met or that the default judgment was irregularly entered.

[30] We also did not agree with Dr. Dorsett's submission, relying on **Lux Locations**, that the master was required to set aside the default judgment entered by Drysdale M because the entry of default judgment is an administrative act and not a judicial one. Firstly, there is nothing in **Lux Locations** which suggests that default judgment cannot be entered by a master or a judge. It would, in our view, be quite incongruous if the court office had the power to enter such a judgment and a judge or master of the High Court could not similarly do so. In any event, this was not an issue before the Court in **Lux Locations**. While the process of entering default judgment may be an administrative act, a default judgment whether it is entered by the court office or by a judge or master is a binding judgment of the court which forecloses on issues of liability between the parties. The **Leymon Strachan** decision of the Privy Council (relied on here by Dr. Dorsett for making a different point) makes this abundantly clear. In short, the fact that it is a judgment in default does not by any means make it any less a judgment of the court.

[31] As the Privy Council said in **Leymon Strachan**, a default judgment is conclusive of the issue of liability. Indeed, the CPR in recognising it to be so, refers to it as a judgment, albeit a default judgment and therefore a judgment which is amenable under the rules to being set aside by the court below without the need to invoke the

appellate jurisdiction of the court. That a default judgment is amenable to this set aside procedure in the court below rather than by way of an appeal makes good sense considering the function of the Court of Appeal is one of review. On an appeal a party would not have the benefit of putting forward evidence such as would be allowed as contemplated under CPR 13.3 and such an appeal would more likely than not be of little or no practical utility to the defaulting party since the Court of Appeal could only review so as to be satisfied on whether or not the conditions for entry of default judgment had been met, but could not purport to exercise a discretionary power such as is given to the court below under CPR 13.3.

- [32] Secondly, it must be borne in mind that Ms. Hogan's claim had already reached the case management stage when the application for default judgment was made. By that time, Drysdale M was fully seised of the case. Having regard to the rolled-up application made in this case, which was not only for default judgment for failure to comply with the master's order, but one in the alternative for an unless order and a wasted costs order, it is quite understandable why a Form 7 request to the court office would not have sufficed. The court office would not have been able to treat with the other heads of relief sought. While a Form 7 request may be made to the court office even where the claim is for 'some other remedy' it is also plain that a party must also make application to a master or judge to determine the relief to be granted, or, put another way, it is the master or judge who must, on application, decide the terms on which the default judgment is to be granted. This rolled-up process is part and parcel of the act of entering default judgment for 'some other remedy'. Adopting the course of action contended for by Dr. Dorsett would also in our view be unusual considering that Drysdale M was fully competent under CPR 26.9 to put matters right by treating Ms. Hogan's application for default judgment as a request in Form 7 and enter judgment once the conditions in CPR 12.5 had been satisfied and then proceed to outline the terms of the judgment in accordance with CPR 12.10(4).

[33] If Dr. Dorsett's submission on this point were accepted, it would flout the maxim 'substance over form' which has statutory footing in section 41 of the **Interpretation Act**.⁹ The section provides that 'where a form is prescribed deviation from the form not affecting the substance or calculated to mislead do not invalidate the form used'. The maxim has also been applied in several decisions of this Court. In **Matthew Thomas v Dr. Ralph Gonsalves**, for instance, the Court stated at paragraph 13 of the judgment that '[t]he 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'. We also considered the words of the Court in **Intrust Trustees (Nevis) Limited et al v Naomi Darren**¹⁰ to be apt - 'to sacrifice substance by way of slavish adherence to form for the purpose of a genuine claim defeats the overriding objective of the CPR rather than gives effect to it'. In our view, the master's approach in setting aside the default judgment for Ms. Hogan's failure to file a Form 7 request (instead of an application for default judgment) would be the triumph of form over substance, thereby defeating the overriding objective of the CPR. For these reasons, we were satisfied that the master fell into error in concluding as she did.

[34] For completeness, we were also of the view that the principles in **Leymon Strachan** for the purpose deployed by Dr. Dorsett were not engaged in this case. The judgment entered by Drysdale M was nothing more than a default judgment under CPR 12.5 regularly entered with the jurisdiction and power to do so. There is no doubt that a default judgment entered by a judge or master can be set aside by a judge or master of co-ordinate jurisdiction under CPR 13.2 and CPR 13.3. In **Matthew Thomas**, this Court explained that '[a] 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'. In this case, however, the default judgment having been regularly entered could only have been

⁹ Cap. 1.02, Revised Laws of Montserrat 2013.

¹⁰ Saint Christopher and Nevis High Court Civil Appeal No. 1A of 2009 (delivered 9th June 2009 unreported).

set aside in exercise of the master's discretion having regard to the factors stated in CPR 13.3. As Mr. Johnson had not invoked CPR 13.3 in his application to set aside, there was no basis upon which the master could properly have set aside the default judgment.

- [35] For the reasons given above, we were of the considered view that the learned master erred in setting aside the default judgment entered in favour of Ms. Hogan on the basis she did. We therefore allowed Ms. Hogan's appeal against the decision. We accordingly set aside the orders of the master made at paragraphs 14(1) (b), (c), (d) and (e) of the decision, specifically those setting aside the default judgment dated 6th February 2020; granting Mr. Johnson leave to file a defence; granting Ms. Hogan liberty to file a reply; and making no order as to costs. Ms. Hogan having succeeded on her appeal, we ordered Mr. Johnson to pay her costs of the application to set aside in the court below and costs on the appeal fixed in the sum of \$3,500.00 by no later than 31st March 2022.

I concur.

Gertel Thom

Justice of Appeal

I concur.

John Carrington

Justice of Appeal [Ag.]

By the Court

Chief Registrar