

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

ANTIGUA AND BARBUDA

ANUHCVP2020/0025

BETWEEN:

LUX LOCATIONS LTD

Appellant

and

YIDA ZHANG

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Roe, QC with Mr. Andrew O’kola for the Appellant

Mr. Barry Gale, QC with Dr. David Dorsett for the Respondent

2020: October 1;

2021: January 11.

Civil appeal – Application to strike out notice of appeal – Default judgment – Section 31(1) of the Eastern Caribbean Supreme Court Act – Whether a defendant against whom default judgment has been granted has a right of appeal pursuant to section 31(1) of Eastern Caribbean Supreme Court Act – Nature of default judgment – Whether a default judgment is a judgment or order of the High Court – Rules 12.7, 12.4, 12.5, 12.10(4) and 12.10(5) of the Civil Procedure Rules 2000 – Claim for ‘some other remedy’ – Default judgment an administrative act performed by court office – Default judgment not a judgment or order of the High Court within meaning of section 31(1) of Eastern Caribbean Supreme Court Act

On 23rd November 2018, the respondent, Mr. Yida Zhang (“Mr. Yida”), filed a claim against the appellant, Lux Locations Ltd, seeking to set aside a consent order entered into by the parties in 2014, whereby Mr. Yida agreed to pay Lux Locations Ltd US\$3,000,000.00 plus interest and costs. Additionally, Mr. Yida sought the repayment of the sums paid pursuant

to the consent order. Mr. Yida served the claim form and the statement of claim on the registered office of Lux Locations Ltd. However, Lux Locations Ltd failed to file a defence within the time prescribed under Part 10 of the **Civil Procedure Rules 2000** ("CPR"). As a result of this, Mr. Yida, on 12th February 2019, made a request for judgment in default of defence.

Upon making this request, the Deputy Registrar of the High Court, by email dated 13th February 2019, informed counsel for Mr. Yida that his application had to be made to the High Court pursuant to rules 12.10(4) and (5) of the CPR. On 20th February 2019, Mr. Yida complied with these instructions and made an application to the High Court. On 7th March 2019, Lux Locations Ltd filed its defence and on the following day, filed an application seeking: (i) an extension of time to file its defence; (ii) an order to strike out the statement of case; and (iii) summary judgment. On 5th June 2019, the application of Mr. Yida and the application of Lux Locations Ltd came up for hearing before the learned judge and on 20th March 2020, the learned judge delivered her ruling, in which she outlined the terms of the default judgment and dismissed Lux Locations Ltd's application and awarded costs to Mr. Yida.

Lux Locations Ltd, being dissatisfied with the learned judge's decision, sought leave of the learned judge to appeal her decision. On 18th June 2020, leave to appeal the decision was granted by the learned judge. Lux Locations Ltd filed its appeal on 9th July 2020 and on 10th August 2020, Mr. Yida filed a notice of application to strike out the appeal. On 1st October 2020, the notice of appeal along with the application to strike out the notice of appeal came up for hearing before this Court and it was determined that the application to strike out the appeal should be heard first, and the appeal thereafter. The Court heard submissions on both the application to strike out and the appeal. In relation to the application to strike out the notice of appeal, the sole issue that arose to be determined was whether a defendant, against whom default judgment has been granted, has a right of appeal pursuant to section 31(1) of the **Eastern Caribbean Supreme Court Act** ("the Supreme Court Act" or "the Act").

Held: striking out the notice of appeal and awarding costs to the respondent in the sum of two-thirds of the costs awarded by the court below, that:

1. In the case of a default judgment for 'some other remedy', rules 12.7 and 12.4 or 12.5 of the CPR must be satisfied. Further, these provisions must be read in conjunction with rules 12.10 (4) and (5) and 12.13 of the CPR. The effect of rules 12.7, 12.4 or 12.5, 12.10(4) and (5) read conjointly with rule 12.13(b) of the CPR 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 pursuant to rules 12.10(4) and (5). The claimant must then make an application to the court, supported by affidavit evidence, to determine the terms of the judgment. The court will then determine the terms of the judgment or in other words, the relief(s) to be granted.

Rules 12.4, 12.5, 12.7, 12.10(4) and (5) and 12.13 of the **Civil Procedure Rules 2000** applied.

2. The grant of default judgment is an administrative act performed by the court office. While in the case of a default judgment for an unspecified sum of money and a default judgment for 'some other remedy', there are some further steps to be taken before the court, such as the assessment of damages or determining the remedy to be granted, the default judgment remains an administrative order and not a judicial order. In assessing damages or determining the remedy to be granted, the court does not, in any way, examine the merits of the claim.

Rules 12.10(2) and 12.10(4) of the **Civil Procedure Rules 2000** applied.

3. By virtue of section 31(1)(b) of the Supreme Court Act, the Court of Appeal has jurisdiction to hear and determine appeals from any 'judgment or order of the High Court'. In interpreting this phrase, a plain and ordinary meaning must be adopted. A default judgment, being an administrative act and not a judicial decision, should not be considered a judgment or order of the High Court within the meaning of section 31(1)(b). A defendant who is dissatisfied with a default judgment must seek to set it aside pursuant to Part 13 of the CPR. Further, a judgment in default cannot be set aside on appeal where the appeal is against the assessment of the damages. Default judgment, having been granted, the learned judge was not required to consider and could not make any findings on issues relating to liability such as the issue of striking out of the statement of case or summary judgment.

Evans v Bartlam [1937] A.C. 473 applied; **Strachan v The Gleaner Newspapers** [2005] UKPC 33 applied; **Dipcon Engineering Ltd v Bowen** [2004] UKPC 18 applied; **Alpine Bulk Transport Company Inc v Saudi Eagle** [1986] 2 Lloyd's Rep. 221 applied; Section 31(1)(b) of the **Eastern Caribbean Supreme Court Act** Cap. 143 of the Laws of Antigua and Barbuda applied; Section 4 of the **Eastern Caribbean Supreme Court Order 1967** (S.I. 1967 No. 223) applied.

4. The filing of a defence or amended defence after the filing of request by the claimant for judgment to be entered for failure to defend, will not avail a defendant. In this present matter, Lux Location Ltd's filing of its application to extend time to file a defence, application to strike out the claim and summary judgment after Mr. Yida's application for default judgment, was not a bar to the grant of default judgment. It was of no moment once the conditions for the grant of a default judgment were satisfied under rule 12.5 of the CPR. It follows that any findings in the judgment of the learned judge pertaining to Lux Locations Ltd's applications are not binding on the parties.

Rolle v Lander DOMHCVAP2013/0025A (delivered 20th October 2020, unreported) applied; **Attorney General v Keron Matthews** [2011] UKPC 38 applied.

JUDGMENT

[1] **THOM JA:** The appellant, Lux Locations Ltd, appealed against the decision of the learned judge, in which the learned judge granted the respondent, Mr. Yida Zhang (“Mr. Yida”), judgment in default in the following terms:

- (i) that the consent order dated the 7th March 2017 obtained in the matter of Lux Locations Ltd v Yida Zhang ANUHCV 2014/0577 be set aside;
- (ii) that all monies paid to the defendant under the terms of the said consent order be repaid; and
- (iii) the matter of interest to be decided by the court.

The learned judge also dismissed Lux Locations Ltd’s application for: (a) an extension of time to file its defence; (b) an order striking out the statement of case; and (c) summary judgment.

Background

[2] The background to this appeal is that in 2014 by Claim No. 2014/0577, Lux Locations Ltd instituted proceedings against Mr. Yida, seeking a specified sum of money and damages for breach of an agency agreement relating to the sale of property. Mr. Yida filed a defence and counterclaim. On 17th March 2017, the parties signed a consent order in which Mr. Yida was required to pay Lux Locations Ltd, US\$3,000,000.00 plus interest and costs.¹ Pursuant to the consent order, Mr. Yida paid Lux Locations Ltd approximately US\$705,555.89.²

[3] On 26th July 2017, Mr. Yida instituted proceedings against Gilbert Boustany, Smith’s Gore BVI Ltd, Lux Locations Ltd and Sam and Nadia Dyson, the directors of Lux

¹ Appellant’s Hearing Bundle, p. 388.

² Appellant’s Skeleton Arguments in response to Respondent’s Submissions, para. 63.

Locations Ltd. Mr. Yida sought damages for fraudulent and/or negligent misrepresentation in relation to the sale of the said property, the subject matter of the 2014 litigation. This claim was struck out by Master Jan Drysdale (“the learned master”) on 28th June 2018³ as being an abuse of process. Mr. Yida appealed the decision of the learned master (“the 2018 Appeal”).

- [4] On 23rd November 2018, Mr. Yida filed a claim against Lux Locations Ltd, seeking to set aside the consent order and for the repayment of the sums paid pursuant to the consent order. The Claim Form and the Statement of Claim were served on the registered office of Lux Locations Ltd on the same day. With Lux Locations Ltd having failed to file a defence within the time specified by Part 10 of the **Civil Procedure Rules 2000** (“CPR” or the “ECSC CPR”), Mr. Yida, on 12th February 2019, made a request for judgment in default of defence.
- [5] The Deputy Registrar of the High Court by email dated 13th February 2019, informed counsel for Mr. Yida that an application had to be made to the High Court pursuant to CPR 12.10(4) and (5).
- [6] On 20th February 2019, Mr. Yida made an application pursuant to CPR 12.10, praying that the court ordered: (i) the terms of the judgment to which Mr. Yida was entitled; and (ii) costs to Mr. Yida.
- [7] On 7th March 2019, Lux Locations Ltd filed its defence and on the following day 8th March 2019, filed an application seeking (i) an extension of time to file its defence; (ii) to strike out the statement of case; and (iii) summary judgment.
- [8] On 5th June 2019, the application of Mr. Yida and the application of Lux Locations Ltd came up for hearing before the learned judge. The learned judge, relying on the dicta of Saunders JA in **St Kitts Nevis Anguilla Bank Limited v Caribbean 6/49**

³ Appellant’s Hearing Bundle, p. 439.

Limited,⁴ that the appropriate approach in determining pending applications is to determine the applications chronologically and logically, determined that Mr. Yida's application should be determined first. The learned judge having heard the applications reserved her decision.

- [9] On 14th November 2019, while the learned judge's decision was still pending, Lux Locations Ltd made an application to adduce fresh evidence. This application was opposed by Mr. Yida. The learned judge heard the application on 24th January 2020 and dismissed it on 28th February 2020.
- [10] On 20th March 2020, the learned judge delivered her ruling, in which she outlined the terms of the default judgment and dismissed Lux Locations Ltd's application and awarded costs to Mr. Yida.
- [11] On 2nd April 2020, Lux Locations Ltd sought leave of the learned judge to appeal her decision. On 18th June 2020, the learned judge granted Lux Locations Ltd leave to appeal her decision and on 6th July 2020, this Court granted Lux Locations Ltd leave to appeal against the decision refusing to admit the fresh evidence.
- [12] Lux Locations Ltd filed its appeal on 9th July 2020 and on 10th August 2020, Mr. Yida filed a notice of application to strike out the appeal. Mr. Yida also, on 13th August 2020, filed an application seeking to withdraw the 2018 Appeal. Both applications are opposed by Lux Locations Ltd.
- [13] On 1st October 2020, the Notice of Appeal, the application to strike out the Notice of Appeal and the application to withdraw the 2018 Appeal all came up for hearing before this Court. It was agreed by the parties that the Court should hear the matters in the following order – firstly, the application to strike out the appeal, secondly, the appeal and after the determination of those matters the application to withdraw the 2018 Appeal should be determined. At the hearing, this Court was informed that on

⁴ SKNHCVAP2002/0006 (delivered 31st March 2003, unreported).

9th April 2020, Lux Locations Ltd made an application to set aside the default judgment. This application to set aside the default judgment is still pending.

Application to Strike out Notice Of Appeal

- [14] Dr. Dorsett, counsel for Mr. Yida, submits that the Notice of Appeal should be struck out since it is a nullity because the court had no jurisdiction to grant leave to appeal. The basis of his proposition is threefold. Firstly, he contends that where a default judgment has been granted and it has not been set aside, the only options available to a defendant are those outlined in CPR 12.13 and CPR Part 13. He urged the Court to apply the plain meaning of the words in construing CPR 12.13 and he referred the Court to the dicta of Lord Neuberger in **Williams v Central Bank of Nigeria**,⁵ where Lord Neuberger stated:

“...When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretative role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black – Clawson International Ltd v Papier wake Waldhof – Aschaffenburg AG* 1975 AC 591, 613, ‘We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.’”⁶

- [15] Dr. Dorsett contends that the effect of CPR 12.13 is that a person against whom a default judgment has been granted and where the judgment has not been set aside, can only be heard on the matters expressly outlined in CPR 12.13. Since leave to appeal is not one such matter, the learned judge had no jurisdiction to grant leave. Consequently, a notice of appeal filed pursuant to a decision granting leave to appeal where there was no jurisdiction to grant leave to appeal is a nullity.

⁵ [2014] UKSC 10.

⁶ Ibid at para 72.

Dr. Dorsett relied on the dicta of Barrow JA in **Oliver McDonna v Benjamin Wilson Richardson**⁷ where Barrow JA stated:

“The Court of Appeal is a creature of statute and an appeal to this court may be made only where statute confers the right to appeal. An appeal cannot exist unless a statute permits it to be brought. It is for this reason that the notice of appeal filed in this case is a nullity. A nullity cannot be cured or retrospectively validated.”⁸

[16] Dr. Dorsett further submits that the avenue that is open to Lux Locations Ltd is to seek to have the default judgment set aside pursuant to CPR 13 which they have done.

[17] Mr. Roe’s short response is that Lux Locations Ltd’s right to appeal is derived from section 31(1) of the **Eastern Caribbean Supreme Court Act** (“the Supreme Court Act” or “the Act”)⁹ He contends that this right of appeal was not abrogated or in any way restricted by CPR 12.13. There is no express provision in CPR 12.13 stating so and this Court should not seek to ascribe such meaning to CPR.12.13 by implication. Mr. Roe, QC further contends that the rule makers of CPR had no power to do so and they did not purport to do so. Mr. Roe, QC referred to the section 17(1) of the **Supreme Court Order 1967**¹⁰ (West Indies Associated States Supreme Court Order) which reads:

“Subject to the provision of this Order and any other law in force in any of the States, the Chief Justice and any other two judges of the Supreme Court selected by him may make rules of court for regulating the practice and procedure of the Court of Appeal and the High Court in relation to their respective jurisdiction and powers in respect of any of the States.”

[18] Mr. Roe, QC further submits that the default judgment and its terms were only made on 20th March 2020, when the learned judge gave her decision. He referred to the

⁷ AXAHCVP2005/0003 (delivered 29th June 2007, unreported).

⁸ Ibid at para 28.

⁹ Cap. 143 of the Laws of Antigua and Barbuda.

¹⁰ S.I. 1967/223

email of the Deputy Registrar to counsel for Mr. Yida dated 13th February 2019 in which she wrote:

“Judgment in default of defence cannot be entered by the court office because the remedy sought is one other than a specified (or unspecified) sum of money. In the case where a party seeks any other remedy from the court, I refer you to CPR 12.10(4) and (5).”¹¹

- [19] While Mr. Roe, QC acknowledged that the rule makers may have contemplated that where default judgment is sought for ‘any other remedy’, default judgment would be granted by the court office and on the application of the claimant, the High Court would determine the terms of the default judgment on which issue the defendant could be heard pursuant to CPR 12.13, he submits however, that in view of the Deputy Registrar’s email, this did not happen. Therefore, no default judgment was in place when Lux Locations Ltd made an application for an extension of time to file its defence, to strike out the statement of case and for summary judgment. The learned judge therefore erred when in determining the application for default judgment, she failed to take into account, whether an extension of time should be granted for Lux Locations Ltd to file a defence and dismissed Lux Locations Ltd’s application. Lux Locations Ltd therefore has a right to appeal the decision pursuant to section 31(1) of the Act. In my view, this latter argument is not relevant to the striking out of the notice of appeal, but it would be relevant if the notice of appeal is not struck out.

Discussion

- [20] It cannot be disputed that where there is a default judgment which is not set aside, the issues of striking out the statement of case and summary judgment are of no moment. Thus, if Dr. Dorsett is correct, that where there is a default judgment and a defendant is dissatisfied with the judgment, the defendant must engage the procedure under Part 13 of the CPR to set it aside rather than engage the appeal process. In so far as the Notice of Appeal also relates to the striking out of the

¹¹ ‘Bundle for Hearing on 1st October 2020’ filed on 9th October 2020, p. 273.

statement of case and summary judgment, they would fall away since there would be a default judgment in place.

[21] The sole issue the Court is required to determine on the application to strike out the notice of appeal is whether a defendant against whom default judgment has been granted, has a right of appeal pursuant to section 31(1) of the Act. The section reads as follows:

“31(1) Subject to the provisions of this Act or any other law –

- (a) the Court of Appeal shall have jurisdiction to hear and determine any matter arising in any civil proceedings upon a case stated or upon a question of law reserved by the High Court or by a Judge thereof pursuant to any power conferred in that behalf by law in operation in Antigua and Barbuda;
- (b) an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court and for the purposes of, and incidental to, the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all of the powers, authority and jurisdiction of the High Court.”

[22] The question which arises is whether a default judgment is a judgment or order of the High Court. In determining this question, it is necessary to examine the nature of a default judgment.

[23] The relevant provision is CPR Part 12. Part 12 outlines the circumstances in which default judgment will be granted (CPR 12.1 and 12.2); the conditions to be satisfied (CPR 12.3, 12.4, 12.5 and 12.6); the procedure to obtain default judgment (CPR 12.7, 12.8, 12.9, and 12.10 (2), (3), (4) and (5)); the types of default judgment to be granted (CPR 12.10, 12.11 and 12.12); and the circumstances in which a defendant may be heard where default judgment has been granted and it has not been set aside (CPR 12.13).

- [24] It is not disputed that the claim does not fall within any of the categories identified in CPR 12.2 in which a default judgment may not be obtained. It is also not a claim where the court's permission is required before judgment in default could be entered such as in CPR 12.3 and 12.10(1)(c)(iii), nor is it a claim for a specified sum of money, or unspecified sum of money, or a claim for goods, but rather, it is a claim for 'some other remedy'.
- [25] Rule 12.7 of the CPR outlines the procedure to be followed by a claimant when seeking judgment in default. It reads as follows: "A claimant applies for default judgment by filing a request in Form 7." This is a broad provision which encompasses all default judgments.
- [26] In cases where the claim is for a specified sum, on the request being made to the court office, if the conditions in rules 12.4 or 12.5 are satisfied, the court office must enter judgment in default for the sum specified. Where however the claim is for an unspecified sum and the conditions in CPR 12.5 are satisfied, the court office must enter judgment in default for the amount to be determined by the court and adjourn the matter to a date for assessment in Chambers, or where 16.2(1)(c) applies, fix a period of time within which the assessment of damages will take place and a date on which listing questionnaire is to be sent to the applicant.
- [27] In those cases where the court's permission is required before seeking entry of judgment in default as outlined in CPR 12.3 (default judgment against the State, minor etc.) and 12.10 (1)(c)(iii) (default judgment requiring the defendant to deliver the goods without giving the defendant the option of paying the value of the goods) an application supported by evidence on affidavit must be made to the High Court. In cases of CPR 12.10(1)(c)(iii), the application must be served on the defendant even though he has failed to file an acknowledgment of service. It is only after permission has been granted by the High Court, then default judgment may be granted on a request made pursuant to CPR 12.7.

[28] In the case of a claim for 'some other remedy', as is the claim in this case, the procedure is also a two-step procedure. The relevant rules are 12.7 (outlined earlier); 12.4 or 12.5 and 12.10(4) and (5). CPR 12.10 (4) and (5) read as follows:

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

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

[29] These provisions must be read in conjunction with CPR 12.13. It reads as follows:

"Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against who a default judgment has been entered may be heard are –

- (a) the assessment of damages, provided that he or she has indicated that he or she wishes to be heard by filing a Notice in Form 31 within seven (7) days after service of the claimant's submissions and witness statements on the defendant pursuant to rule 16.2(2);
- (b) an application under rule 12.10(4);
- (c) costs;
- (d) enforcement of the judgment; and
- (e) the time of payment of the judgment debt."

[30] 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.

[31] The equivalent provision in the UK CPR is somewhat different. The UK CPR 12.4 contains explicit provisions for default judgment to be obtained both by request for default judgment in cases for specified sum of money, unspecified sum of money and claims for goods where the defendant is given the option to return the goods or to pay the value of the goods, and by way of application to the court in cases such as where the claim is for 'some other remedy' as is stated in UK CPR 12. 4(2):

“The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment (a) on a claim which consists of or includes a claim for any other remedy;”

In the ECSC CPR there is a single procedure by making a request to the court office.

[32] The above shows that the scheme in Part 12 of the CPR is for default judgment to be granted by the court office. The grant of default judgment is an administrative act performed by the court office. There are instances such as those referred to in rule 12.10(2) as it relates to default judgment for an unspecified sum of money and in rule 12.10(4) where default judgment is granted for some other remedy, there is some further step to be taken before the court, before those judgments could be enforced. In cases of an unspecified sum of money, the court assesses the amount of money to be paid by the defendant, while in rule 12.10(4) the court determines the nature of the relief to be granted to the applicant. The default judgment however remains an administrative order and not a judicial order. In assessing damages or determining the remedy to be granted, the court does not in any way examine the merits of the claim. The claimant is not required to prove his case. Since his allegations are not being challenged by the defendant, the defendant not having filed a defence, the allegations are treated as true for the purposes of the default judgment. The default judgment is conclusive on liability in respect of all matters pleaded.

[33] Where a judgment in default is granted by a judge of the High Court, the nature of the default judgment does not change. The CPR makes provision for a judge to

perform a function which should be done by the court office. CPR 2.4 defines the court office as follows:

“Court office refers to –

- (a) the place where documents are to be filed etc. and include a Registry of the High Court and of the Court of Appeal; and
- (b) members of the court staff who carry out work of a formal or administrative nature under rule 2.6(1).”

Rule 2.6(1) of the CPR reads:

“Where these rules refer to an act being done by the court office or require or permit the performance of an act of a formal or administrative character, that act may be performed by a member of the court staff authorized generally or individually in writing by the Chief Justice.”

CPR 2.6.(3) also states that:

“If a step may be taken by a member of the court staff –

- (a) that person may consult a judge, master, or registrar before taking the step; and
- (b) that step may be taken by a judge, master or registrar instead of a member of the court staff”.

[34] I agree with Mr. Roe, QC that the default judgment was not granted before 20th March 2020. I do not agree with the submission of Dr. Dorsett that a grant of default judgment is automatic once the application is made pursuant to Part 12 of the CPR. The court office is required to be satisfied that the conditions in CPR 12.4 or 12.5 are met and if satisfied, the court office must then determine the nature of the default judgment to be granted having regard to the provisions of CPR 12.10.

[35] A default judgment being a judgment which has not been decided on merits is subject to be set aside or varied by the court. The principle in **Evans v Bartlam**¹² is still applicable. There, Lord Atkin in his judgment stated that:

“... unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive

¹² [1937] A.C. 473.

power where that has only been obtained by a failure to follow any of the rule of procedure.”¹³

[36] The procedure for so doing so is set out in CPR Part 13. This power to set aside can be exercised even where damages has been assessed or the terms of the judgment determined by the court. This is illustrated in the case of **Strachan v The Gleaner Newspapers**.¹⁴ There, on a claim for libel for an unspecified sum of money, default judgment was entered with damages to be assessed. The default judgment was then set aside by another judge Walker J. after damages were assessed. On application by the claimant to set aside the judgment of Walker J., Smith J. refused to do so on the ground that he had no jurisdiction to set aside the judgment of a judge of coordinate jurisdiction. The claimant appealed to the Court of Appeal on the basis that the order of Walker J was made without jurisdiction. The appeal was dismissed. On appeal to the Privy Council this contention was also rejected. In so doing their Lordships relied on three principles:

“...The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International*...citing *Lunnon v Singh* (unreported) 1 July 1999, EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata*. The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined.”

[37] Further, a judgment in default cannot be set aside on appeal where the appeal is against the assessment of the damages. This is illustrated in the decision of the

¹³ Ibid at p. 480.

¹⁴ [2005] UKPC 33.

Privy Council in **Dipcon Engineering Ltd v Bowen**¹⁵ where their Lordships agreed with **Dipcon** that it was not open to the Court of Appeal to set aside a default judgment on an appeal against the assessment of damages (they recognized that the Court of Appeal could have granted leave to appeal against the refusal to set aside the default judgment). They referred to the case of **Alpine Bulk Transport Company Inc v Saudi Eagle**¹⁶ and stated that:

“Whilst *Saudi Eagle* is clear authority if authority were needed for the proposition that an application to set aside a default judgment can be made (and if refused, can then be appealed) notwithstanding that final judgment has subsequently been entered, it is certainly not authority for saying that on an appeal against an assessment of damages a previous default judgment can be set aside without any such application ever having been made or, as here a previous refusal to set aside the default judgment can be challenged without refusal itself being appealed.”¹⁷

[38] In my view, the phrase ‘judgment or order of the High Court’ must be given its plain and ordinary meaning. When read in the context of the Act, section 31(1) seeks to outline the jurisdiction of the Court of Appeal from decisions of the High Court. The High Court is defined in the Act to mean ‘High Court of Justice established by the Court Order.’ The Court Order is defined in the Act to mean the **Eastern Caribbean Supreme Court Order 1967** (“the Supreme Court Order”).¹⁸ Section 4 of the Court Order reads:

“(1) There shall be a Supreme Court for the States which shall be styled the Eastern Caribbean Supreme Court and shall be a superior court of record.

(2) The Supreme Court shall consist of a Court of Appeal and a High Court of Justice.”

There is no provision in the **Supreme Court Order** which expressly or implicitly includes the Court Office/Court Staff as being the High Court. The Court Office provides administrative support to the High Court.

¹⁵ [2004] UKPC 18.

¹⁶ [1986] 2 Lloyd's Rep. 221.

¹⁷ Supra note 17 at para 24.

¹⁸ S.I. 1967 No. 223.

[39] A default judgment being an administrative act and not a judicial decision, is therefore not a judgment or order of the High Court within the meaning of section 31(1)(b) of the Act. A defendant who is dissatisfied with a default judgment must seek to set it aside pursuant to CPR Part 13. The learned judge having granted default on the terms she outlined, the effect of the default judgment meant that the issue of liability was *res judicata*. The learned judge was not required to consider and could not make any findings on issues relating to liability such as the issue of striking out of the statement of case or summary judgment. This in my view is the effect of the decision of this court in **Rolle v Lander**.¹⁹

[40] In **Rolle**, Baptiste JA stated that the Board in **Attorney General v Keron Matthews**²⁰ pointed out that there is no rule which states that if a defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rule, however, makes provision for what the parties may do if the defendant fails to file a defence within the prescribed period. In the present matter, the claim not being a fixed date claim, the defendant faced the risk of a request by the claimant that judgment in default should be entered in his favour. That risk materialised when the claimant made the request. Upon receipt of such a request, the court office must enter judgment for failure to defend if the conditions set out in rule 12.5 of the CPR are satisfied. Accordingly, the filing of a defence or amended defence, after the filing of request by the claimant for judgment to be entered for failure to defend will not avail a defendant. Mr. Yida having made application for default judgment before Lux Locations Ltd filed its applications to extend time to file its defence, to strike out the claim and for summary judgment, Lux Locations Ltd's applications were not a bar to the grant of default judgment. Indeed, they were of no moment once the conditions for grant of default were satisfied. It follows that any findings in the judgment pertaining to Lux Locations Ltd's applications are not binding on the parties.

¹⁹ DOMHCVAP2013/0025A (delivered 20th October 2020, unreported).

²⁰ [2011] UKPC 38.

[41] In view of the above, I find that the leave to appeal was a nullity and the notice of appeal is a nullity and must be struck out. It is therefore ordered that the notice of appeal is struck out and the appellant shall pay the respondent costs being 2/3 of the costs in the court below.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar