[2016] JMSC CIV. 22

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE FULL COURT**

**CLAIM NO. 2014HCV02965**

**BEFORE : THE HONOURABLE MISS JUSTICE JENNIFER STRAW**
**THE HONOURABLE MR JUSTICE DAVID BATTS**
**THE HONOURABLE MRS JUSTICE AUDRE LINDO**

**IN THE MATTER OF ERROL BROWN v NATASHA RICHARDS AND PHILLIP RICHARDS BEFORE THE SUPREME COURT CLAIM NO. 2010 HCV 00124**

**AND**

**IN THE MATTER OF THE CONSTITUTIONALITY OF RULE 12.13 OF THE CIVIL PROCEDURE RULES 2002, AS AMENDED**

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|---|---|---|
| **BETWEEN** | **NATASHA RICHARDS** | **1ST APPLICANT** |
| | **PHILLIP RICHARDS** | **2ND APPLICANT** |
| **AND** | **ERROL BROWN** | **1ST RESPONDENT** |
| | **THE ATTORNEY GENERAL** | **2ND RESPONDENT** |

**IN OPEN COURT**

**Denise Senior – Smith instructed by Oswest Senior – Smith & Company for the Applicants**

**Lord Anthony Gifford Q.C. instructed by Messrs. Reitzin & Hernandez for the 1st Respondent**

**Carlene Larmond and Tamara Dickens instructed by the Director of State Proceedings for the 2nd Respondent**

**HEARD: 14th December 2015 and 14th March 2016**

**Straw J**

**The Parties**

**[1]** The Applicants, Natasha Richards and Phillip Richards who are the 1st and 2nd defendants respectively in claim No. 2010 HCV 00124 brought against them by the 1st respondent ,Errol Brown ,seek the following relief under the Constitution with respect to rule 12.13 of the Civil Procedure Rules 2002, [CPR] as amended:

1. *A Declaration that the operation and effect of Rule 12.13 of the abovementioned rules as amended are in breach of the fair trial rights enshrined in s.16(2) of the Charter of Fundamental Rights and Freedoms and is unconstitutional, null and void.*

2. *That the Applicants be permitted to participate actively in the Assessment of Damages to be heard in the said claim No. 2010 HCV 00124.*

3. *Costs to the Applicants.*

**The Issues**

**[2]** The issues raised in the submissions are essentially twofold. Firstly there is a preliminary issue as to whether the Court of Appeal had previously ruled on the constitutionality of Rule 12.13. Secondly, whether the said Rule accords with the principle of fairness as mandated in the Charter of Fundamental Rights and Freedoms.

**[3]** My brother Batts J, has set out the history of the matter in paragraphs 17 and 18 of his judgment which I have read in draft and I agree with his reasoning and conclusion on all the points raised therein. He has set out the orders of the court at paragraph 35.

**The overall fairness of the Civil Procedure Rules (CPR)**.

**[4]** I wish however to comment on one aspect of the submissions of Lord Anthony Gifford, QC, counsel for the 1st respondent. He has submitted that the proceedings must be considered as a whole when determining the issue of fairness. It is his contention that the Applicants had many opportunities based on the rules contained in the CPR to put themselves in a position to be heard so looking at the proceedings as a whole, there has been no unfairness. He submitted further that they both had rights which they chose not to exercise.

Counsel set out the three options that were available under the CPR to the Applicants as follows:

> 1. *Allow a judgment in default to be entered: in which case his rights of audience in the assessment of damages are "severely restricted": Rule 12.13.*
>
> 2. *Admit the claim when acknowledging service: in which case he may participate as provided by Rule 16.3(6)*
>
> 3. *File a defence setting out the facts which he seeks to prove concerning the quantum of damages: in which case he may adduce evidence and cross-examine.*

**[5]** Lord Gifford has also asked that we take into account the burden on the courts in Jamaica and contends that it is legitimate to insist on prompt compliance with the rules of procedure. In examining the issue of fairness, he referred the court to the case of **Akram v Adam [2004] All ER [D] 444** [Nov] where the English Court of Appeal ruled that the right to a fair trial as set out in Article 6 of the European Convention on Human Rights [The European Convention] was not breached in circumstances where a defendant was unsuccessful in setting aside a default judgment. It is to be noted however that this was in circumstances where the defendant alleged that the prescribed method of service did not allow the claim to be drawn to his attention. It is also to be noted that the issue concerned an order for possession of premises and did not involve any subsequent hearings to complete determination of any outstanding issues.

**[6]** It was the considered opinion of that court that the default judgment had been regularly entered but if the defendant could show that he had a real prospect of defending the claim the court would be empowered to set aside the default judgment so long as the application was made promptly, after the defendant has become aware of it. [per paragraph 42] The CPR in this jurisdiction has identical provisions. [Rule 13.3]

**[7]** In the claim involving the parties before this court, the default judgments were not set aside. Batts J, at paragraph 30 of his judgment, speaks to the difference between a claim for specified and unspecified damages. In a claim involving unspecified damages as in the present circumstances, is it demonstrably justified (per section 13 (2) of the Charter) that defendants be shut out of any opportunity to be heard on the issue of damages? Counsel for the 2nd Respondent, the Attorney General, Ms Carlene Larmond posed this question to the court and submitted that it is not.

**[8]** Counsel examined Article 6 [1] of The European Convention which confers the right to a fair hearing and referred the court to pronouncements upon the said right by The European Court of Human Rights. In particular, she referred to the case of **Beles and Others v the Czech Republic,** [Application no. 47273/99] where the court stated as follows at paragraphs 49 and 61 respectively:

> *The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by article 6&1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights.....*
>
> ***.....the** "right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard.....Nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6&1* ***if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued. See*** *Guerin v France judgment of 29 July 1998, Reports 1998-V, p 1867 & 37.* ***[Emphasis added]***

**[9]** Lord Gifford referred the court to **Stephen Grant v R** [2006] UKPC 2 where the Privy Council readily accepted the relevance of the Strasbourg jurisprudence on article 6 [3] of the European Convention as applicable to Jamaica [per paragraph 17]. The Board however went on to emphasize that the sole concern of the Strasbourg court is to assess the overall fairness of the criminal proceedings. It is to be noted that Article 6 [3] speaks only to criminal trials, although the principle of fairness is applicable in both the civil and criminal arena. Article 6 [1] deals specifically with both criminal and civil rights and speaks to the right of access to the court.

**[10]** Mrs Denise Senior Smith, counsel for the Applicants, referred the court to commentary of the learned authors of **Blackstone's Civil Practice 2003** [Oxford University Press] at page 1367, in which they discuss the right to a fair trial as enshrined in Article 6.It is stated that one of the requirements necessary for a fair trial is' equality of arms'.

**[11]** This concept is expressed as a party having a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis a vis his opponent.[per **Kaufman v Belgium** No. 10938/84, 50 DR 98 at 115[1986]]

**[12]** On this issue of overall fairness, I consider the further submissions of Ms Carlene Larmond, who submitted on the nature, effect and scope of a Default Judgment. The gravamen of her submission is that there is a distinction between allegations which are traversable and those which are not. Counsel referred the court to the definition of 'traverse' set out in **The Merriam – Webster dictionary** as follows:

> *A formal denial of a matter of fact alleged by an opposing party in a legal pleading.*

**[13]** She submitted that an allegation as to damages is not a traversable allegation and a default would not be tantamount to an admission to damages. Counsel concluded therefore that the result should be that the defaulting defendant would

be entitled to participate in the hearing as to damages. In my opinion, there is merit in her submissions on the point.

**[14]** The ultimate issue, as both counsel for the Applicants and counsel for the 2nd respondent have submitted, is whether or not the severity and importance of rule 12.13 are proportionally aligned, bearing in mind that there is no automatic right to a default judgment being set aside once it is regularly entered. Batts J has examined the ruling of the Eastern Caribbean court of appeal in **George Blaize v Bernard LA Mothe and The Attorney General** (at paragraph 27 of his judgment) which dealt with a similar challenge to an identical rule as the one under consideration by this court. In giving the decision of that court, Baptiste JA stated thus at paragraph 12:

> *The right of access to court not being absolute, the question is whether the limitation imposed by the rule with respect to cross-examination and the bar to counsel making submissions on the issue of quantum pursues a legitimate aim in the public interest and whether the rule is necessary and proportionate to the achievement of the aim.*

**[15]** I would agree with the assessment of that court despite Lord Gifford's gallant submission on the overall fairness of the CPR.

**Batts J.**

**[16]** At the commencement of this matter it was agreed that the time for oral submissions would be allocated as follows: one hour and thirty minutes for the Applicant, two hours for the 1st Respondent, one hour and thirty minutes for the 2nd Respondent and the 1st Respondent would be afforded the opportunity to reply to both the Applicants' and the 2nd Respondent's submissions. The Court was asked to order that all documents filed and served pursuant to the order of the Court made on October 20, 2015 should stand and this was done.

**[17]** The parties filed detailed written submissions and these were supplemented by oral submissions made before us. I will not attempt to repeat those submissions. The parties are to rest assured that I have carefully reviewed them all as well as the authorities cited. There are no issues of fact to be determined. It is sufficient,

in these reasons for judgment, that I outline the issue and the factual matrix before stating my conclusion on the sole issue of law to be determined. I will of course in stating that conclusion on the law advert to such of the parties' submissions as I deem necessary in order to impart my reasons for that conclusion.

**[18]** The only Affidavit filed in the matter is to be found at tab CC of the Judges core Bundle. It is sworn to by Natasha Richards and Phillip Richards (the Applicants before us in this Claim) and is dated 17th June, 2014. The material facts being that they are Defendants in Claim 2010 HCV 00124. Errol Brown, the First Respondent in this claim, is the Claimant in that action. It is a claim to damages for personal injuries allegedly sustained in a motor vehicle accident. Natasha Richards was allegedly the driver of one of the motor vehicles involved in that accident and Phillip Richards was the owner of the said motor vehicle. An order for substituted service on the Richards was made, pursuant to which, service was to be effected by advertisement in a daily newspaper and by service on NEM Insurance Company Limited (now JN Insurance Company Limited). An Acknowledgement of Service was filed on behalf of Phillip Richards. His Defence and Counter claim were filed on July 20, 2011. However, on January 24, 2011 an Interlocutory Judgment had been obtained against Phillip Richards for his failure to file a defence within the stipulated time. The Claimant (Errol Brown) nevertheless filed a Defence to Counterclaim and Phillip Richards filed a Reply and Defence to Counterclaim.

**[19]** On the 28th February, 2011 an Interlocutory Judgment was obtained against Natasha Richards for failure to file an Acknowledgment of Service. A Defence was filed on her behalf on the 4th January 2012. On January 12, 2012 a Notice of Application to set aside Judgment against Natasha Richards was filed. That application was supported by an affidavit as to the merits of the Defence and alleged that Ms Richards had no knowledge that service of the Claim Form had been effected. The interlocutory judgments against the 1st and 2nd Defendants were not set aside. The Applicants' affidavit does not indicate whether the

application to set the judgment aside was heard and dismissed or whether it has not yet been heard. An assessment of damages was listed for hearing but by order of The Honourable Mrs. Justice Sinclair-Haynes (as she then was) made on 13th December 2013, a stay of the assessment of damages was granted pending the hearing of this application for constitutional relief.

**[20]** The Applicants are concerned that Rule 12.13 of the Civil Procedure Rules 2002 will prevent their active participation at the scheduled assessment of damages. They are of the view that that rule is unconstitutional. They wish the court to declare that when an assessment of damages is heard a defendant against whom damages are to be assessed has a right to be heard on the quantum of damages.

**[21]** One would have thought that the matter would be impatient of debate. Audi alteram partem has been a sine qua non of British Constitutional law for hundreds of years. Proponents of natural justice, the rule of law and all it implies, regard with anathema the prospect of a person's rights or obligations being determined without reference to that person. This basic principle has been adopted and applied in the Commonwealth Caribbean and is to be regarded as an integral part of our legal fabric. The principle has found concrete manifestation in section 16(2) of the Constitution of Jamaica. Section 16 states:

> **"(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**
>
> **(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."**

The rights enshrined in the Bill of Rights or Charter of Fundamental Rights and Freedom, "The Charter" as it is called, may only be vitiated if legislation is passed

by Parliament which is "demonstrably justified in a free and democratic society". (See section 13.2 of the Constitution of Jamaica).

**[22]** The 1st Respondent to the application before us contends that Rule 12.13 of the Civil Procedure Rules 2002 (as amended) creates an exception to the principle of fairness described above. Rule 12.13 is 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 whom a default judgment has been entered may be heard are-**
>
> **(a) Costs;**
> **(b) The time of payment of any judgment debt;**
> **(c) Enforcement of the judgment; and**
> **(d) An application under rule 12.10(2).**
>
> **(Part 13 deals with setting aside or varying default judgments)"**

**[23]** The 1st Respondent asserts also that the issue before this court has already been pronounced upon by the Jamaican Court of Appeal. It was submitted that *res judicata* applies and that we must follow those decisions of the Court of Appeal without further enquiry into the matter. The first case on which they rely is **Hugh C Hyman et al (a firm) et al v Dave Blair** [2013] JMCA App 15 unreported judgment of the Court of Appeal delivered on the 21st June 2013. At para 13 and 14 of his judgment Dukharan JA said,

> "**13. Mr Wood QC, for the Applicants, argued the grounds of the application together for convenience. He was critical of rule 12.13 of the Civil Procedure Rules (CPR), in that, by that rule, the Applicant's role would be that they could not actively participate at the assessment of damages except in relation to costs. He submitted that that result is so startling and so repugnant to any principles of natural justice that he would ask this court to review the matter. He however conceded that there was an element of negligence on the part of the Applicants. He urged the Court to set aside the default judgment. However he added that if**

> **that order is to stand, then alternatively the Applicants could be allowed to fully participate at the assessment.**
>
> **14. Learned Queen's Counsel further submitted that the Applicants had a constitutional right to participate, as the Constitution guarantees the right to a fair hearing. He argued that any rule in the CPR must be read subject to the constitutional guarantee. He said rule 12.13 would be an absurdity if one could not participate**."

**[24]** Having dealt seriatim with each ground of appeal, Justice of Appeal Dukharan in paragraph 29 entitled "conclusion" stated,

> **"It is clear that rule 12.13 of the CPR applies. It is subject to and in conformity with the dictates of the Constitution – see** *Blagrove v Metropolitan Management Transport Holdings Limited*. **The Applicants having failed to have the judgment set aside will only have limited participation at the assessment. I agree with Harrison JA that the Applicants have not satisfactorily demonstrated that there is some likely prospect of success on their part should the matter proceed to trial**."

**[25]** It is not surprising that this bit of dicta is the only reference in his judgment to a "constitutional issue". This is because no ground of appeal raised a constitutional issue, nor was the constitutionality of the rules challenged in the grounds of appeal. The reference by Dukharan JA is not to be regarded as a considered decision of the court because the case he referenced (**Blagrove**) was not a case which considered the constitutionality of rule 12.13. When read carefully, Dukharan JA was assuming, not deciding, that rule 12.13 is "subject to and in conformity with the dictates of the Constitution." The question before us, which was not before the Court of Appeal, is whether rule 12.13 offends the provisions of the Constitution and ought to be struck down.

**[26]** In ***Rexford Blagrove v Metropolitan Management Transport Holdings Limited*** **and Lloyd Hutchinson** SCCA 111/2005 unreported Judgment delivered on the 10th January 2006, the case to which Dukharan JA adverted, the Defendants filed a document admitting liability but requiring proof of damages.

On the hearing of the assessment of damages the trial judge (then Dukharan, J) ruled that the Defendants be given a right to cross – examine. In its judgment on a procedural appeal challenging the order of Dukharan J, the Court of Appeal stated : (page 5)

> **"I am unable to agree with Mr Reitzin that Dukharan J, erred in ordering that the defendant be permitted to cross - examine the Claimant and his witness at the assessment of damages."**
>
> The court went on at page twelve to say:
>
> **"at the assessment of damages after admission the defendant is entitled to cross – examine the Claimant's witnesses and make submissions. There is no corresponding entitlement in respect of a defendant against whom default judgment is entered.**
>
> **As I have earlier stated, I am of the view that in the instant case, the relevant procedure is that which pertains to judgment on admission pursuant to Part 14. The request for the entry of a default judgment was not the correct procedure.**
>
> **In sum where the defendant admits the whole of the claim for a specified sum of money, the Claimant must file a request for Entry of Judgment on Admission pursuant to rules 14.8 (2) and 16.3 (2) – see form 7**
>
> **In my judgment Dukharan, J was entitled to treat the matter as an application for Judgment on Admission to be entered for damages to be assessed. Accordingly, the Learned Judge was correct in holding that the Defendants/ Respondents were entitled to cross–examine the Claimant and his witnesses and to make submissions to the Court on quantum"**

It is manifest that **Blagrove** did not consider the constitutionality of the provisions. The court merely construed and applied the sections. Its constitutionality was assumed not decided. Dukharan JA's dictum in the case of **Hugh Hyman** must be similarly regarded.

**[27]** The issue before this court is therefore free of binding authority. It is safe to say no court in this jurisdiction at a higher level than the Full Court has considered the constitutionality of rule 12.13. The point has however been considered by a superior court in this region. In the matter of **George Blaize v Bernard La Mothe and the Attorney General** HCVAP 2012/ 004 (judgment delivered on the October 9, 2012 by the Eastern Caribbean Court of Appeal) the question was clearly considered and answered. The rule under consideration was identical to our own, and was challenged on the ground of unconstitutionality. The report ( at paragraph 6 ) reveals that counsel on both sides eventually conceded that the rule restricting the right of a defendant to participate at the assessment of damages was unconstitutional. The court nevertheless, and no doubt due to the importance of the issue, went on to give a full, considered and reasoned judgment on the matter. The court concluded thus :

> **"15. Cross-examination is undoubtedly a potent weapon in the arsenal of a lawyer and is a fundamental aspect of the judicial process. In an adversarial system such as ours, it provides a means whereby the case of the other party can be effectively challenged and undermined. It is also important to the judicial process that a party has the right to explain and comment on all "the evidence adduced or observations submitted, with a view to influence the court's decision."**
>
> **Thus in Vanjak v Croatia [2010] ECHR 34 at paragraph 52, the European Court of Human Rights said,**
>
> > ***'independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with. That right means in principle the opportunity for parties to court proceedings falling within the scope of article 6 to have knowledge of and comment on all evidence adduced or observations submitted, with a view to influencing the court's decision."***

> **16. We are cognisant that the right of access to the court calls for regulation by the State. We are also satisfied that interference with the right may be justified on the grounds that the particular legislation may pursue a legitimate aim and if the scope of the legislation is necessary and proportionate to the achievement of the aim. We are of the opinion and hold that barring the right to be heard ( cross-examination and the right to make submissions) in the circumstances dictated by CPR 12.13 effectively restricts or reduces the access left to a defaulting defendant to such an extent that it impairs the very essence of the right of access to the court. Furthermore there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."**

**[28]** The Eastern Caribbean Court of Appeal has therefore pronounced similar provisions to our own unconstitutional. I respectfully find the reasoning of that court compelling and certainly would adopt their reasons. I have come to a similar decision in this case.

**[29]** Let me be clear however, that had the matter of the construction of rule 12.13 not already been determined by the Jamaican Court of Appeal, I would have been prepared to construe the rule so as to save it and make it accord with constitutional principles. Briefly it appears to me that when read in conjunction with rules 16.2 (4) (b) (c) and (d), section 12.13 is intended only to apply where there is judgment in default for a specified amount. This is so because there would be no need to mandate standard disclosure of documents, filing and exchange of witness statements and listing questionnaires unless there is to be a hearing at the assessment of damages. My construction would mean implying words into rule 12.13. Our Court of Appeal did not adopt so generous a construction of the section. That being the case therefore, and on the construction placed on the section by the Court of Appeal, it is manifest that the rule is in breach of the Constitution of Jamaica.

**[30]** There are a few observations I wish to make largely out of deference to the well structured and articulated submissions of Lord Anthony Gifford, Q.C. There is to be drawn a distinction between claims for specified amounts (liquidated damages) and for unspecified amounts (unliquidated damages). In the former, a defendant properly served, who elects not to enter an acknowledgment of service or to defend, can safely be assumed to have acceded without demur to the amount of the claim. In the latter case however, no such conclusion can be drawn. The defendant after all may well and reasonably expect that, although liable, if and when a court is to make a determination on quantum his or her input, no matter how negligible, will be accepted. That input may amount to no more than attendance at the assessment to ask the Claimant giving evidence if he is still feeling pain, or more likely to cite some relevant case on damages to assist the court while it assesses quantum. I believe the ordinary Jamaican would be surprised to know that a court of law would, at a hearing to quantify damages against him, say he must remain silent because he had not filed an "admission". Moreso because even if no acknowledgement were filed, it has long been the practice of our court to accept undertakings to file, and allow an immediate right of audience. Form, in the way of a failure to file an acknowledgment, was not allowed to prevail over the substantive right to be heard. We should not by this decision allow substantive rights to be taken away because of formalities. Even if one has no positive case to put, the trial process will still benefit from cross-examination (which tests the witness) or by submissions which may bring to the attention of the court aspects of the medical report or authorities on damages, relevant to the issue of quantum.

**[31]** There is a further reason which, even had the matter been free of direct authority, would have compelled the decision at which I have arrived. I advert to the fact that prior to the Civil Procedure Rules (CPR) 2002, an assessment of damages was in the nature of a trial. The Jamaican Court of Appeal in the matter of ***Leroy Mills v Lawson & Skyers (1990) 27 JLR 196,*** decided that a default judgment merged with the assessment and that the final judgment was in the nature of a

judgment after trial. This is certainly sound law and good sense. An entry of judgment in default is often an administrative act. The Registrar satisfies herself that there has been since the Claim, no filing of defence or appearance (now called acknowledgement of service) and that the requisite time has passed. The Registrar has then no lawful discretion to exercise. When damages are to be assessed however it is a judicial exercise. It requires active consideration and the exercise judicially of a discretion. In such a situation any party to be affected as a matter of law has a right to be heard. Our courts would not be worthy of the title "Courts of Justice" if we were to hold otherwise.

**[32]** I should also make brief reference to the able submissions from counsel for the 2nd Respondent. Those submissions referenced the decision from the Eastern Caribbean Court of Appeal and took no issue with it. In short, learned counsel for the Attorney General conceded the unconstitutionality of the provision. They argued convincingly that there is a disproportion between the objective of the rule on the one hand and its impact on the right on the other. They rightly conclude that "the two (severity and importance) are in no way proportionally aligned". I respectfully agree.

**[33]** In these circumstances and for all the reasons stated above it is my considered decision that the Defendant at an assessment of damages has a right to be heard. Any provision which removes that right is unconstitutional and cannot be reasonably justified in a free and democratic society. The legislature may wish to revisit this matter. It would seem to accord with principle that an entry of acknowledgment is a reasonable pre-requirement to a right of audience .It enables the Defendant's address for service to be known and it demonstrates that the Defendant acknowledges in writing the jurisdiction. It certainly may be reasonable, and indeed is already the rule of practice, to provide that no positive case can be suggested in the absence of a statement of case and/ or witness statement duly filed and served prior to the hearing. However a party ought not to be barred or otherwise restricted from making relevant submissions or asking

relevant questions of witnesses at his assessment of damages. I urge the rule makers to bear these principles in mind if the rule is to be reformulated.

**[34]** On the matter of costs I am well aware that costs generally follow the event. These are however proceedings for judicial review. Order 56.15 (4) and (5) provide:

> **"(4) The court may, however make such orders as to costs as appear to the court to be just including a wasted costs order.**
>
> **(5) The general rule is that no order for costs may be made against an Applicant for an administrative order unless the court considers that the Applicant has acted unreasonably in making the application or in the conduct of the application. (Part 64 deals with the courts general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders)".**

I bear in mind that the First Respondent is a private individual, unconnected to the state. The state, the Second Respondent, presented submissions in support of the Applicant. The First Respondent opposed the application and in doing so relied on the letter of the rule and on decisions of the Court of Appeal. We do not believe in those circumstances it can be said that the First Respondent was unreasonable to oppose the application. Therefore, these being proceedings for judicial review, we do not believe the First Respondent should be penalized with costs for litigating at first instance this matter. It is one of general public interest, concerning as it does, rules of practice and their constitutionality. Order 56.15 (4) protects a Claimant from such a "punishment" where he is unsuccessful. It is no doubt premised on the assumption that the respondent to the application is the state or its agent. In this case I am minded to afford the First Respondent a similar protection. There will therefore be no order for costs made, that is each party will bear his/her own costs.

**[35]** In the result;

(i) It is hereby declared that rule 12.13 of the Civil Procedure Rules 2002 as amended is unconstitutional, null and void and is hereby struck out of the Civil Procedure Rules 2002.

(ii) It is ordered and declared that the Applicants are entitled to participate actively in the assessment of damages which is to be heard in suit 2010HCV000124. ***Errol Brown v Natasha Richards and Phillp Richards.***

(iii) No Order as to costs

**Lindo J**

**[36]** I have read the reasons for judgment that have been written by my learned sister Straw J and brother Batts J in support of our decision. I am in total agreement with the reasons and conclusion and have nothing to add.

**Straw J**

**.....**

**Batts J**

**.....**

**Lindo J**

**.....**