IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV02110

BETWEEN	**MICHAEL SPENCE** **(Administrator of Estate Dorothy Spence)**	**CLAIMANT**
AND	**OLIVE MAUD FORBES**	**DEFENDANT**

IN CHAMBERS

Mr Lemar Neale and Ms Chris-Ann Campbell instructed by NEA|LEX Attorneys-at-law for the claimant/ applicant.

Victoria Brown Attorney-at-law for the defendant.

Heard: 29 January 2024, 8 February 2024 and 31 July 2024

Application to revoke order previously made using CPR rule 26.1(7) – Application for leave to appeal – Whether declaratory reliefs may be granted on an ex parte application for default judgment – Whether prerequisites of CPR rule 12.10(4) and (5) were satisfied – Whether absence of reasons for decision is a basis for granting leave to appeal.

MASTER C MCNEIL (AG)

Introduction

[1] The application before the court was made by the claimant on 7 June 2023 seeking the following reliefs -

> *"1. The order of Master Ms. Tamara Dickens (Ag.) made on May 24, 2023, be revoked.*

2. In the alternative, the Applicant be granted permission to appeal against the order of Master Ms. Tamara Dickens (Ag.) made on May 24, 2023.

3. Costs of this application to be costs in the claim.

4. Such further and other relief as this Honourable [court] may deem just."

[2] The grounds relied upon by the claimant were -

"(a) *Rule 26.1(7) of the Civil Procedure Rules, 2002 (as amended) (the "CPR") empowers the Court to vary or revoke orders.*

(b) Rule 1.8(1) and (2) of the Court of Appeal Rules, 2002 (as amended) (the "CAR") provides that where permission to appeal is required, the application must first be made to the Court below.

(c) An order can be revoked at any time before it has been drawn up and perfected having regard to all the circumstances of the case and the overriding objective.

(d) The order was made on May 24, 2023, but it has not yet been drawn up and perfected.

(e) Pursuant to Rule 1.8(7) of the Court of Appeal Rules, 2002, the Applicant's appeal will have a real chance of success based on the following:

(i) The learned Master erred in law when she refused the Applicant's without notice application for court orders in default of defence.

(ii) The learned Master erred in law when she found that Rule 12.10(4) of the CPR does not apply to an application to enter default judgment where the claim is for remedies including declarations and orders in respect of a claim for entitlement to property.

(iii) The learned Master erred in law when she found that declaratory orders cannot be obtained by default judgment. In so finding, the learned Master failed to appreciate that an application for court orders is necessary to obtain declaratory relief sought pursuant

to rule 12.10(4).

(f) The granting of permission to appeal will be in keeping with the overriding objectives of the court and the efficient administration of justice."

[3] This application was heard on 29 January 2024 and I reserved decision to 8 February 2024. The decision was orally delivered on 8 February 2024 wherein I refused to revoke the order and granted the alternative order to allow the claimant to appeal the decision of Master Dickens made on 24 May 2023. I promised to give my written reasons at a later date and this is a fulfilment of that promise.

Background

[4] The claimant is the administrator of Estate Dorothy Spence, deceased by virtue of a Grant of Administration issued by the Supreme Court on 8 June 2021. The deceased died on 22 February 2018. The claimant brought this claim on behalf of the deceased's estate against the defendant, Olive Maud Forbes by way of claim form and particulars of claim filed on 4 July 2022.

[5] The claimant alleges in her claim that the deceased was the registered proprietor of property being all that parcel of land part of Friendship in the parish of Saint Mary containing by survey thirty-nine perches, five-tenths of perch of the shape and dimensions and butting as appears by the said plan and being the property formerly registered at Volume 1109 Folio 896 of the Register Book of Titles (hereafter referred to as the "property"). The claimant further alleges that on or before 12 May 2017, the defendant obtained a new certificate of title for the property in her name, having caused the Registrar of Titles to cancel the previous title by virtue of an application for adverse possession. The new title is comprised in certificate of title registered at Volume 1508 Folio 23 of the Register Book of Titles.

[6] The claimant challenges the defendant's title to the property on the basis of fraud. The claimant raised allegations of fraud, particularized as follows -

PARTICULARS OF FRAUD

(a) Making a false declaration to the Registrar of Titles that the Defendant was in sole, peaceful and undisturbed possession of Dorothy Spence's property for upwards of 12 years.

(b) Knowingly providing misleading information under oath that she was entitled to Dorothy Spence's property by adverse possession.

(c) Procuring persons to give voluntary declarations supportive of the Defendant's false declaration that she was in sole, peaceful and undisturbed possession of Dorothy Spence's property for upwards of 12 years.

(d) Causing the property to be transferred to her to the detriment of Dorothy Spence and her estate."

[7] In addition to the particularization of fraud, the claimant pleaded that at "all material times prior to 2017, Dorothy Spence had family members and relatives as her agents looking after the property for her and at no point in time was the Defendant seen on the property exercising rights of ownership inconsistent with Dorothy Spence's ownership thereof". The claimant also alleged that he visited the property between 4 to 6 times per year and he paid property taxes for the property on behalf of the deceased except for the years 2013 to 2015 when he discovered in 2015 that the taxes were already paid by a person unknown. The next time the claimant attempted to pay taxes was in 2019 when at this time he discovered that the property was no longer owned by the deceased.

[8] The claimant is seeking the following reliefs -

"1. A declaration that the Defendant is not entitled to the legal or beneficial interest in ALL THAT parcel of land part of FRIENDSHIP in the parish of Saint Mary registered at Volume 1508 Folio 23 of the Register Book of Titles (hereinafter called the "said property").

2. A declaration that the Defendant obtained her interest in the said property by fraud.

3. A declaration that the legal and beneficial interest in the said property is held by the deceased Dorothy Spence or her estate.

4. An order that the Defendant deliver up the Duplicate Certificate of Title for the said property to the Registrar of Titles for cancellation.

5. An order directing the Registrar of Title to issue a new certificate of title in the name of Dorothy Spence or her estate.

6. Liberty to apply.

7. Costs to be costs in the claim.

8. Such further or other relief as this Honourable Court deems necessary or appropriate."

[9] The order made by Master Ms T Dickens on 24 May r2023 takes effect from the day it is made. See rule 42.8 of the CPR. Nothing in the rules and no rule cited by the claimant suggests that an order of the court takes effect only after the formal order has been drawn up and signed by the court. In any event, the minute of order has been signed by the learned Master and I have notice of it. Although the claimant prayed in aid rule 26.1(7), the said rule cannot assist in these circumstances.

[10] The claim form and particulars of claim were served on 19 August 2022 on the defendant by service on the defendant's Attorneys-at-law, Victoria W Brown & Associates of 49 York Avenue, Kingston 11. An acknowledgement of service signed by Ms Brown and dated 19 August 2022 was filed on 25 August 2022. The defendant did not file a defence.

[11] On 8 March 2023, the claimant made a "without notice application for court orders" seeking orders that judgment be entered against the defendant in default of a defence being filed on her behalf and for costs to be awarded to the claimant. The application was based on Supreme Court Civil Procedure Rules (CPR) rule 12.10(4) for some other remedy than a specified sum. The application was supported by the affidavit evidence of the claimant filed on 8 March 2023.

[12] On 24 May 2023, the application came on for hearing before Master Ms T Dickens (Ag.) who refused the claimant's application. No reasons were supplied by the learned Master for refusing the application for default judgment.

[13] Subsequent to the learned Master's decision, on 7 June 2023, the claimant filed the application for revocation of the orders of Master Dickens or alternatively for leave to appeal the decision. The application is supported by an affidavit of Chris-Ann Campbell filed 7 June 2023. The claimant also referred to a Supplemental Affidavit of Michael Spence in Support of Without Notice of Application for Court Orders filed 3 October 2023.

Legal basis in support of the application

[14] Counsel for the claimant relied on CPR rule 26.1(7) to say that the court as comprised in empowered to vary or revoke previous orders made, whether made by the same or some other judge of co-ordinate jurisdiction. Counsel further stated that the order can be revoked at any time before it has been drawn up. Reliance was placed on the decision of **Re L and B (children) (care proceedings: power**

to revise judgment) [2013] 2 All ER 294, **Stewart v Engel** [2000] 3 All ER 518, **Petrojam Limited v Sea Ventures Shipping Limited & Ors** [2013] JMCC Comm 16.

[15] On the issue of whether the learned Master wrongly refused the claimant's application for default judgment, counsel submitted that the correct procedure was utilized, that is, the claimant was entitled by CPR rule 12.10(4) to apply for default judgment where some other remedy than a specified sum was claimed. The claimant indicated that his application was in full compliance with CPR rule 12.10(4) and 12.10(5). In this regard, the claimant also, strangely, relies on a supplemental affidavit filed subsequent to the decision of the learned Master who refused his application. On this point, counsel relied on the decisions of **Keith Gardner v Christopher Ogunsalu** [2020] JMSC Civ 8 and **Mary Chandler v Patrick Marzouca** [2016] JMSC Civ 3. I will say more on this below.

The issues

[16] Two issues arise for determination. They are -

i. Whether the order of the learned Master should be revoked?
ii. Alternatively, whether the claimant's proposed appeal discloses any reasonable prospect of success?

Analysis and Discussion

Issue i – application to revoke order

[17] I accept that in appropriate circumstances, CPR rule 26.1(7) may be used to vary or revoke a previous order made by the court. CPR rule 26.1(7) provides that a "*power of the court under these Rules to make an order includes a power to vary or revoke that order*". I also accept the authorities relied upon by the claimant.

However, I do not form the view that this is an appropriate case for the exercise of the discretion to revoke the Order of Master Dickens.

[18] In the decision **Gloria Chung & Ors v Michael Chung & Anor** [2018] JMSC Civ. 44, Rattray J, considered the authorities on this point inclusive of those referred to by learned counsel for the claimant and the Court of Appeal decision in **San Souci Ltd v VRL Services Ltd** SCCA No 20/2006, a judgment delivered 2 July, 2009, and **Norman Harley v Doreen Harley** [2010] JMCA Civ 11, In conclusion the learned judge opined that -

> *"[68] I glean from these Authorities, that before the coming into effect of the CPR, it was well settled that until an Order of the Court was perfected, the Judge could at any time vary or revoke his Order. This principle has not been lost with the advent of the CPR, as Rule 26.1(7) confers such powers on the Court. However, Rule 26.1 (7) is not specific as to whether the power can be invoked after the Order has been perfected, or whether it can only be invoked before the Order is perfected by the Court*."

[19] There are no guidelines in the CPR to guide a judge in respect of the circumstances in which such discretion is to be exercised to vary or revoke an order. In the circumstances, the court is then to be guided primarily by the CPR, rule 1.1 – the overriding objective. I am also guided by the English Court of Appeal authority of **Tibbles v SIG plc (t/a Asphaltic Roofing Supplies)** [2012] EWCA Civ 518. The English rule 3.1(7) reads the same as our CPR rule 26.1(7). The guidelines supplied therein is stated as non-exhaustive. After a careful review of the authorities in relation to the English rule 3.1(7), the court made the following observations:

> *"[39] In my judgment, this jurisprudence permits the following conclusions to be drawn:*
>
> *(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid*

undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii) *The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.*

(iii) *It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.*

(iv) *Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.*

(v) *Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.*

(vi) *Edwards v Golding is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the*

form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

[40] I am nevertheless left with the feeling that the cases cited above, the facts of which are for the most part complex, and reveal litigants, as in Collier v Williams, seeking to use CPR 3.1(7) to get round other, limiting, provisions of the civil procedure code, may not reveal the true core of circumstances for which that rule was introduced. It may be that there are many other, rather different, cases which raise no problems and do not lead to disputed decisions. The revisiting of orders is commonplace where the judge includes a "Liberty to apply" in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable. In this connection see the opening paragraph of the note in The White Book at 3.1.9 discussing CPR 3.1(7), and pointing out that this "omnibus" rule has replaced a series of more bespoke rules in the RSC dealing with interlocutory matters.

[41] Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time. On that basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.

[42] I emphasize however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an Applicant once much time had gone by. With the passing of time is likely to come prejudice for a Respondent who is entitled to go

forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR 3.9(1)(b)). Indeed, the checklist within CPR 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order."

[20] Guidance was also provided by Mangatal J, in **Petrojam Limited** to determine whether it was appropriate for the court to exercise its powers under CPR rule 26.1 (7). The learned judge stated -

*"1. The Court could consider whether there are any compelling reasons justifying the Court revisiting its orders or judgment. In the **Engel** decision, the decision of Neuberger J **In re Blenheim Leisure (Restaurants) Ltd (no.3) The Times**, 9th November 1999 was cited as setting out justifiable instances of cases where the jurisdiction might justifiably be invoked. These include:*

i. Plain mistake on the part of the court

ii. Failure of the parties to draw the Court's attention to a fact or point of law that was plainly relevant

iii. Discovery of new facts subsequent to the judgment being given

iv. If the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider.

*2. In the **Stewart v Engel** case, it was also suggested that where the Court is being asked to revisit its order or judgment in order to allow an amendment to a statement of case, the Court should consider the timing of the application.*

3. Both Clarke L.J. and Baroness Hale in their respective judgments indicated that the Court should also consider whether any party had acted upon the decision to their detriment in deciding whether to grant or refuse the application.

*4. In **Re L and another**, Baroness Hale also pointed out that justice might require the revisiting of a decision, for no more reason than the judge having a carefully considered change of mind."*

[21] In those circumstances, I am unable to grant the claimant's application in this regard. There is nothing found in the affidavit evidence put forward by the applicant to show any change of circumstance or failure of the parties to draw the learned

Master's attention to a fact or point of law that was plainly relevant or that the learned Master was misled. It is difficult to ascertain these matters independent of any affidavit evidence especially in circumstances where there is no reason on the face of the order or by way of written opinion from the learned Master. The court cannot be left in a state of speculation in circumstances where the court is being asked to revoke an earlier judgment of a judge of co-ordinate jurisdiction.

[22] Furthermore, I am guided by the decision in **Lux Locations Ltd v Yida Zhang** [2023] UKPC 3 wherein the Privy Council in considering similar rules of Trinidad and Tobago to that of our CPR rule 12.10(4) and (5). The JCPC noted that "*An appeal lies to the Court of Appeal from the court's decision on the application [for default judgment] in the ordinary way.*"

Issue ii. – Permission to appeal

[23] The success of the claimant's application for permission to appeal depends on whether the court is of the view that the appeal will have a real chance of success. The term "real chance of success" has been interpreted in several cases in several decisions with reliance often placed on **Swain v Hillman** [2001] 1 All ER 91. All the claimant is required to show is that the proposed appeal demonstrates a realistic rather than fanciful prospect of success.

[24] In this case, the submissions made by learned counsel as to the grounds (recited above) on which the proposed appeal will be made cannot be said to be devoid of merit. Whether the learned Master was correct to refused the application for default judgment or whether the learned Master was correct that 12.10(4) does not enable the court to make declaratory order on a default judgment application requires closer analysis. Such an analysis should be conducted on an appeal and it cannot be said it could not be determined in the claimant's favour.

[25] I am mindful of the Privy Council decision in **Lux Locations Ltd v Yida Zhang**. This appeal concerned an application for default judgment for some other remedy. The JCPC analyzed the litany of cases which discussed the approach the court should take when faced with an application for default judgment for some other remedy. The Board noted the position in principle as thus -

> *"49. A rule which requires the court to give "such judgment as the claimant is entitled to", or judgment "in such form as the court considers the claimant to be entitled to", on the statement of claim leaves open the possibility that the court considers that the claimant is not entitled to any judgment on the statement of claim. The logical implication is that, where this is so, no judgment should be entered. That is also what the overriding objective of dealing with cases justly requires. Suppose, for example, that the only remedy claimed in the statement of claim is an injunction - say to stop a book from being published or to require a building to be demolished - and the court considers that, on the facts alleged, applying the relevant legal principles, it is not appropriate to grant any such injunction. It would not be right in those circumstances, nor compatible with the wording of the rule, for the court to grant a remedy which the court does not consider the claimant to be entitled to on the statement of claim. In such a situation the court should therefore decline to grant default judgment.*
>
> *50. The same applies, in the Board's view, where it appears to the court that the statement of claim is one that ought to be struck out, for example because it is incoherent, does not disclose a legally recognisable claim or is obviously ill-founded. The aim of the default judgment procedure is to provide a speedy, inexpensive and efficient way of dealing with claims which are uncontested and to prevent a defendant from frustrating the grant of a remedy by not responding to a claim. Those objectives, however, do not justify a court in giving judgment on a claim which is manifestly bad or an abuse of the court's process, even if the defendant has failed to take the requisite procedural steps to defend it. The public interest in the effective administration of Page 18 justice is not advanced, and on the contrary would be injured, by granting the claimant a remedy to which the court considers that the claimant is not entitled.*
>
> *51. It is true, as Briggs J pointed out in the Football Dataco case (see para 45 above), that the need for an application to the court is triggered not by anything connected with the legal foundation of the claim, but by the nature of the relief sought. Where the remedy sought is an award of money only, a default judgment can be*

obtained automatically by an administrative process without any judicial scrutiny. But it does not follow that, where an application to the court is required, the court should only ever consider what remedy is appropriate given the allegations made and have no regard to whether those allegations have any legitimate basis. The underlying policy reason for requiring the safeguard of judicial scrutiny where a remedy other than money is claimed must be that granting such a remedy potentially involves greater interference with rights and freedoms of the defendant (and perhaps others) than entering a money judgment which the defendant can apply to set aside. If the safeguard is to be meaningful, it should operate as a filter for manifestly ill-founded or improper claims.

52. In the Football Dataco case Briggs J did not suggest otherwise. The question which concerned him was whether a default judgment should be given when a reference had been made to the Court of Justice of the European Union in another case raising the same legal issue. The fact that the legal basis of the claim was the subject of uncertainty was held not to be a sufficient reason to decline to grant default judgment. The decision was expressly limited, however, to cases "where the particulars of claim disclose a cause of action which is not obviously bad" (para 24). Likewise, in the defamation cases referred to at para 46 above, Warby J made it expressly clear that the general approach which he outlined would not be suitable where, for example, the claim could be seen to be unsustainable."

[26] The Board then summarized what it considered to be the proper approach to an application for default judgment where the claim is for some other remedy as follows,

(i) *"The court should first of all determine whether the relevant conditions in rule 12.5 (or rule 12.4) are satisfied. The Board is proceeding on the basis that for the purposes of rule 12.5(b) and (c)(i) it is sufficient that the defendant had not filed a defence (and the period for doing so had expired) at the date of the application.*

(ii) *Even if the relevant conditions are satisfied, the court should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside.*

(iii) *If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on*

the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court.

(iv) An appeal lies to the Court of Appeal from the court's decision on the application in the ordinary way."

[27] The approach stated by the Privy Council requires the court to scrutinize the claim to determine whether the claimant is entitled to the relief sought where the claim is for some other remedy other than a specified sum. Given the absence of reasons, I am unable to assess what the learned Master took into consideration when refusing the application. In those circumstances, that may be a basis to consider appealing the decision.

[28] Counsel for the claimant did not refer for my consideration any authority in which the issue of whether declaratory reliefs may be granted on an application for default judgment. My research has however disclosed that there is a general reluctance by the court in granting declarations on an application for default judgment and expressed the preference that such orders are to be made on an inter partes application. A recent authority of England and Wales in **Goldcrest Distribution Ltd v McCole and others** [2016] EWHC 1571 ("**Goldcrest")** discusses the issues which I have reproduce in full and I have found the same to be instructive. This is a High Court decision and therefore, it will be useful for our Court of Appeal to pronounce upon this issue. The court in **Goldcrest** said -

"Declaration on default judgment

33. The second point was that the court ought not to give declaratory relief on an application for default judgment. In relation to this question, I was referred to the well-known decision of the Court of Appeal in Wallersteiner v Moir [1974] 1 WLR 991. There the Claimant sued the Defendant for libel in respect of a circular letter to shareholders of a company of which the Claimant was a director, alleging that the Claimant's creature company was seeking to

acquire shares in that and another company in breach of company law. The Defendant immediately put in a 'home-made' defence, which some two years later was replaced by a professionally drafted defence and counterclaim. That counterclaim sought declarations of fraud, misfeasance and breach of fiduciary duty by the Claimant, and the payment of equitable compensation to the companies concerned. The Claimant did not file or serve a reply or defence to counterclaim, or indeed prosecute the action.

34. Some three years later, the Defendant applied for (i) dismissal of the claim on the basis of want of prosecution and (ii) judgment on the counterclaim, including both monetary relief for the breach of company law and the declaratory relief as to the conduct of the Claimant. The master (i) refused the application to dismiss the claim, but (ii) granted the application for judgment on the counterclaim. On appeal to the judge, the master's decision on the first point was reversed, and the claim dismissed. On the second point the judgment in default given by the master was affirmed. The Claimant appealed to the CA.

35. The Court of Appeal refused the appeal so far as related to the first point, the dismissal of the claim. But, on the second point, the court distinguished between the declaratory and monetary relief sought on the counterclaim. It dismissed the appeal in relation to the monetary relief. But it allowed it in relation to the declarations granted. Lord Denning MR devoted most of his judgment to the monetary relief aspect of the case. As to the remainder, he said simply this (at 1017E):
“On the other issues [than monetary relief] Dr Wallersteiner should be given leave to put in a defence, but on the terms that he pays all the costs incurred hitherto.

On the broad lines of the case, I find myself in agreement with the judge and would dismiss the appeal: but there should be variations in the respects I have mentioned.”

36. Buckley LJ (at 1028H-1029D) was more forthcoming:
“The order which [the judge] made was on the lines of a minute which had been prepared and submitted to him. There was little or no discussion about its form. Following the prayer in the counterclaim, it contains a large number of declarations, including declarations that Dr Wallersteiner has been guilty of fraud. I am more familiar with the practice in the Chancery Division than in any other division of the High Court, but it is probably in the Chancery Division that more use is made of declaratory relief than elsewhere. It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or

in default of pleading. A statement on this subject of respectable antiquity is to be found in Williams v. Powell [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the Defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admission or by agreement or in default of pleading, and it is necessary to make clear upon what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be upon such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation."

37. Scarman LJ (at 1030C-E) made the same decision, though his reasons were not the same:
"[T]hough I entertain grave doubts as to the bona fides and honesty of Dr Wallersteiner both in the financial dealings the court is now considering and in the conduct of this litigation, injustice might well be done to him if without the benefit of trial, the court should declare him fraudulent, guilty of misfeasance and of breach of trust. For the very reason that the case reeks of the odour of suspicion, it is, I believe, the duty of the court to exercise caution before committing itself to sweeping declarations: to look specifically at each claim, and to refrain from making declarations, unless justice to the claimant can only be met by so doing. Generally speaking, the court should leave until after trial the decision whether or not to grant declaratory relief, and if so, in what terms: see Williams v. Powell [1894] WN 141."

38. I note in passing that in New Brunswick Railway Co Ltd v British and French Trust Co Ltd [1939] AC 1, HL (to which I was referred on the quite different question of estoppel), Lord Maugham LC said (at 22):
"I think it right to observe that it is in my view undesirable that judges should make declarations as to the true construction of documents on motions for judgment in default of defence. It has not, I believe, been the practice to do so in the Chancery Division for a good many years. As far as possible the Court should make such declarations only when the matter has been argued by counsel on each side, and is then the subject of adjudication by the judge."

39. In the same case, Lord Russell of Killowen said (at 28):

"I would only add that I agree with what the Lord Chancellor has said as to the undesirability of making declarations as to the construction of documents except after arguments on behalf of all persons interested."

40. The Claimant relies on the decision in Wallersteiner v Moir to argue that the court should not on an application for default judgment grant a declaration. In that case the Court of Appeal stripped out the declaratory relief from that granted by the judge. But it is notable that the three judges expressed themselves differently as to the applicable principle. Buckley LJ was most clearly in favour of the principle that the court should not grant a declaration on default judgment: "If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence." Indeed, he said that this case was all the stronger, because it accused the Claimant of fraud. But the fraud accusation was not the ground of his judgment on this point; it was the default judgment.

41. On the other hand, Scarman LJ founded his decision clearly on the accusation of fraud against the C: "injustice might well be done to him if without the benefit of trial the court should declare him fraudulent". Thus, it was the duty of the court "to refrain from making declarations, unless justice to the claimant can only be met by so doing." It was only "[g]enerally speaking" that "the court should leave until after trial the decision whether or not to grant declaratory relief". Lord Denning MR was even less clear that there should be a principle of the kind referred to by Buckley LJ. He simply gave leave to the Claimant to put in a defence without explaining why.

42. At the same time I bear in mind that of the three judges who sat, Buckley LJ was the only one who had practised at the chancery bar and sat in this division of the High Court. I also bear in mind the comments of the two chancery members of the HL in the New Brunswick Railway case, at paras [39-40] above. They speak of the "undesirability" of making declarations in relation to the construction of documents without argument. That does not go quite as far as Buckley LJ, but it does go further than Scarman LJ and Lord Denning MR.

43. Whatever the experiences of the past, in the modern legal system, where the rules in the High Court should not be interpreted differently in the QBD and in this division, and the overriding objective (CPR rule 1.1) of doing justice at proportionate cost is to be observed everywhere, it would not be right to hold that declarations can never be given on default judgments. In my judgment, the better rule is that declarations should not be given without argument inter partes, save in the clearest cases. That is consistent with all the

judicial statements to which I was referred except that of Buckley LJ. Even in relation to his views, the fact is that the rules of evidence today are more relaxed than they were in his time, and there is an even greater need to conserve precious trial time for those cases where it really is necessary. So long as a declaration can be given without injustice to those affected by it, the court should not be hamstrung merely by the fact that it is being sought on an application for default judgment."

[29] The **Goldcrest** decision was applied in another High Court decision of England and Wales in **Cyntra Properties Ltd v Gillborn and Another** [2023] All ER (D) 44 (Apr). In this case the court was faced with the issue of whether default judgment would be granted where the claimant sought a declaration in the following terms: (i) a tenant had to show 12 years of adverse possession of an area before they were entitled to claim that it had become an accretion to their lease; (ii) a surrender of the lease (including a surrender and re-grant) would cause time to start running again; and (iii) in the premises, neither the first nor second defendant was entitled to have the roof space above their flat registered as an accretion to their lease. The court having found that the conditions prerequisite to a default judgment application in the English CPR rule 12.3 were clearly satisfied, granted the claimant's application for default judgment. The court found that there was nothing in CPR Part 12 that expressly prohibited a claimant from obtaining declaratory relief in default. The court however express that caution should the exercised especially where the application was being made ex parte. The court indicated that any declaration made ought to proceed on the evidence. The court had to consider the possibility of prejudice caused to third parties if declaratory relief is given.

[30] In all the circumstances, given the absence of the learned Master's reasons for her decision, I am unable to determine whether the learned Master formed the view that the prerequisites of CPR rules 12.10(4) and (5) were met, that is, whether the affidavit evidence disclosed sufficient bases for the granting of the relief or whether the pleadings disclosed that the claimant is entitled to the reliefs sought or some

other factor for refusing the orders. I make this observation because the claimant at the time of his application before the learned Master, sought to rely on his affidavit filed 8 March 2023 with the sole exhibit being an acknowledgment of service. There was no evidence with respect to the Grant of Administration to him, the Certificates of Title, the cancelled and current titles and any evidence either through third parties or contemporaneous documents to support his allegations set out in his pleadings. The claimant sought to cure this by providing a supplemental affidavit filed 3 October 2023, several months after the learned Master refused the application. There is no application to adduce fresh evidence therefore the claimant's purported reliance on the supplemental affidavit is at best questionable.

[31] However, the claimant has framed his application before me to the effect that the learned Master refused to grant his application that declaratory reliefs cannot be granted. In the absence of reasons, I find that there is some prospect of success on appeal based on the proposed grounds of appeal. The claimant's application for leave to appeal should be granted. I am mindful of the Court of Appeal decision in **Suzette Curtello v The University of the West Indies** [2018] JMCA App 37 wherein Phillips JA held that absence of reasons may be a ground on which an appeal may be argued with success. In those circumstances, it is in the best interest of justice that the application for leave to appeal be granted.

Disposition

[32] In the circumstances, the following were ordered:

1. Paragraph one of the claimant's Notice of Application for Court Orders filed on 7 June 2023, to revoke the Order of Master Ms T Dickens (Ag) made on 24 May 2023, is refused.

2. The claimant is granted permission to appeal against the order of Master Ms T Dickens (Ag) made on 24 May 2023.

3. No order as to costs.

4. The claimant's attorneys-at-law are to prepare, file and serve the orders made herein.

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Master Miss C McNeil (Ag)