IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO: 651 of 2011

BETWEEN

DEAN OLIVER BURROW **CLAIMANT/RESPONDENT**

AND

ARTHUR SALDIVAR **DEFENDANT /APPLICANT**

Keywords: Defamation; Slander**;** Libel & Defamation Act; Default Judgment**;** Set aside Default Judgment; Practice and Procedure; Part 13 Civil Procedure Rules; Part 2.6 Civil Procedure Rules; Court Staff.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates: 16th December 2013
23rd January 2014

Appearances:

Mr. Rodwell R. A. Williams, S. C. for the Respondent

The Applicant appeared in person unrepresented

DECISION

Delivered on the 23rd day of January 2013

Introduction

[1] This is an application by the Defendant /Applicant ("the Applicant") to set aside a default judgment dated 16th October 2013 and entered against him herein on the

15th October 2013 by the Claimant/Respondent ("the Respondent") pursuant to Part 13.4 of the Supreme Court (Civil Procedure) Rules.

[2] The terms of the default judgment are as follows :

> *"The Defendant not having filed and served a defence.*
>
> *IT IS THIS DAY ADJUDGED That the Defendant do pay the Claimant damages including aggravated damages to be assessed by affidavit evidence and costs."*

[3] The present application is for the court to exercise its discretion to set aside the stated default judgment, not under Part 13.4 but under Part 13.3 of the Supreme Court (Civil Procedure) Rules 2005 ("the Civil Procedure Rules"), on the grounds that the Applicant has applied promptly, has a good explanation for failure to file a Defence, and has a real prospect of successfully defending the claim.

[4] This case raises principally the issue of whether the Applicant has a good claim and the Applicant consequently has a real prospect of succeeding against the Respondent.

The Court Proceedings

[5] The Claim herein was commenced by the Respondent by Claim Form and Statement of Claim filed on the 17th October 2011 and served on the Applicant on the 19th October 2011.

[6] In the Claim Form the Respondent claimed the following relief:

(i) Damages including aggravated damages for slander contained in words spoken to the general public by the Applicant in the course of the Applicant 's telephone call to the Krem Radio talk show entitled "Wake Up Belize Morning Vibes" on the 6th day of September 2011.

(ii) Such further or other relief as the court may deem just.

(iii) Costs.

[7] The Statement of Claim alleged that the Respondent was an attorney-at-law by profession and a Senior Counsel who served as a Cabinet member in Belize and

has served and continued to serve as Prime Minister of Belize; while the Applicant was an attorney-at-law and "the standard bearer for the Opposition's People's United Party for the Belize Rural North division".

[8] The Statement of Claim also alleged that the Applicant on the 6th day of September 2011 telephoned the daily morning talk show called "Wake Up Belize Morning Vibes" which was broadcast live via Krem Television, Krem Radio and over the internet to the public in Belize and the word at large, and re-broadcast in the evening in the time immediately leading up to the local 6:30 p.m. television news.

[9] The Statement of Claim further alleged that in the course of the Applicant's telephone call he spoke and published to the general public words defamatory of the Respondent calculated to disparage him in his office as the Prime Minister of Belize, and his profession as an attorney-at-law, and by reason of which publication the Respondent has suffered serious injury to his personal and professional reputation and has suffered considerable embarrassment and distress, for which the Respondent claims Damages, including aggravated damages for slander, other relief as may seem just to the court and costs.

[10] The impugned words were fully set out in the Statement of Claim, and it was claimed that in their ordinary meaning, were meant and were understood to mean that the Respondent:

(1) is a corrupt person who occupies the office of the Prime Minister of Belize.

(2) as the Prime Minister of Belize required of his Government that 85,000 acres of land, amounting to 20 percent of the Corozal District, be given to one individual.

(3) as the Prime Minister of Belize is deeply involved in corruption.

[11] The Claim Form and Statement of Claim were served on the Applicant on the 19th October 2011.

[12] The Applicant filed an Acknowledgement of Service on the 27th day October 2011 in which he, inter alia, indicated that he did not admit any part of the claim and intended to defend the claim.

[13] Nothing then appeared to have happen in relation to the claim until, by letter to the Registrar dated 16th July 2013, the Respondent's Attorney wrote to the Registrar requesting that the claim be fixed for Case Management Conference; as a result of which the case was then assigned to the present Judge on the 22nd July 2013 who then fixed a Case Management Conference for the 28th October 2013.

[14] In the meantime, on the 15th October 2013, the Respondent filed a Request for Entry of Judgment in Default of Defence, dated 15th October 2013, pursuant to Rule 12.10(1)(b) which was on the basis that:

(a) The time for the Applicant to file and serve defence has expired;

(b) No defence or counterclaim as been served on the Respondent;

(c) The Respondent was in a position to prove the amount of the damages; and

(d) The Respondent's estimate of the time required to deal with the assessment was one day, and Judgment should be entered for damages including aggravated damages to be assessed and costs for slander contained in words spoken to the general public by the Respondent in course of the Respondent's call to the Krem Radio talk show entitled" Wake Up Belize Morning Vibes" on the 6th day of September 2011.

[15] The above default judgment, entitled "Order For Default Judgment", was signed by the Deputy Registrar and was entered against the Applicant.

[16] The Applicant, through his Attorney-at-law, on the 18th October 2013 then filed a 'Notice of Application to Set Aside Default Judgment', pursuant to Rule 13.4 of the Rules of the Supreme Court, which was supported by an Affidavit sworn to by the Applicant.

[17] The grounds of the Applicant's application were:

(a) The Applicant has applied to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) The application has a good explanation for failure to file a Defence.

(c) "The applicant has a real prospect of successfully defending the claim.

[18] In the Applicant's Affidavit he set out the progress of the case to date and deposed to the following:

(a) "While I filed the Acknowledgment of Service in time, I discovered that in setting out to preparing to file a Defence, I could not find that the Claim disclosed any actionable wrong. It was at that point I realized that the filing of the Claim was an abuse of process."

(b) "I was advised and verily believe that I needed to not file a Defence since the Claim was improper in that it disclosed no cause of action for which the court could exercise its jurisdiction."

(c) I have been informed and do verily believe that for the aforementioned reasons I have a real prospect of defending this Claim".

[19] On the 28th October 2013 there was a Case Management hearing and the court explained that due to its own professional difficulties it was not in a position to deal with the matter. An Order was therefore made adjourning the CMC and Application to set aside default judgment to the 16th December 2013.

[20] On the 13th December 2013 the Applicant filed a 2nd Affidavit in which he deposed to the following:

(a) That he has been informed and verily believed that he had a real prospect of success.

(b) That in the Statement of claim the Respondent had made certain allegations against him but that he (the Respondent) had not established that the person making the telephone call was the Applicant nor had he shown that as a result of the statements made he had suffered any damages.

(c) The Applicant then exhibited a copy of his Defence to his Affidavit.

(d) In the Defence the Applicant admitted the averments about the Respondent, and the Applicant put the Respondent to strict proof of the allegation that he telephoned the alleged morning talk show and the details of the broadcast of the show. The Applicant denied that the words impugned, bore or were understood to bear or were capable of bearing any of the meanings alleged or any defamatory meanings and claimed that the words are not actionable without proof of special damage and none was alleged. The Applicant averred that the words, if spoken and published at all (which was denied) were not spoken by the Applicant and otherwise denied the other allegations in the Statement of Claim including that the Respondent had suffered the alleged or any damages.

[21] On the 16th December the Case Management hearing and Application to set aside default judgment was heard and submissions were made by and on behalf of the Parties.

The Law

The law in relation to Slander

[22] Claims relating to the tort of slander (oral or transient defamatory statements) are based upon the common law but with statutory modifications[1] and are actionable per se, that is without proof of special damage, where it is alleged that the Defendant made an oral defamatory statement (i.e. calculated to disparage or is injurious to the Claimant) published by the Defendant of and concerning the Claimant of a particular character or category without lawful justification or excuse[2].

[23] The character or category of such slanderous defamatory statements, include claims, such as are alleged in the present claim, concerning an allegation of an untrue imputation against the reputation of the Respondent published by the

[1] See Gatley on Libel and Slander 11th Edition at Paragraph 1.1 page 4.
[2] See 28 Halsbury's Laws of England (4th Edition) Paragraphs 1, 12 and 49. See Also Gatley on Libel and Slander 11th Edition at Paragraph 1.6 and 3.6.

Applicant, which were calculated to disparage the Respondent in, and in relation to the conduct of any office (such as that of Prime Minister of Belize), or profession[3] (such as an attorney-at-law and a Senior Counsel), and which imputes unfitness for or conduct in such office or profession (because, it is alleged, he is a corrupt person or involved in corruption in such office or profession)[4].

[24] The Libel and Defamation Act, Chapter 169, Revised Edition 2000, Law of Belize, does not repeal the entire common law rules in relation to the tort of slander, but in relation to such rules, merely seeks to amend or modify such laws in various ways, including by making provision for the admission by way of mitigation of damages of an offer of an apology before the trial of the action[5]; making statements actionable per se imputing unchastity or adultery to any woman or girl[6]; making the broadcasting of words a publication in permanent form[7]; and making provision for statutory defences of a fair and accurate report of certain public meetings[8] and of court proceedings[9] etc. This position is clear from even a cursory perusal of the Libel and Defamation Act and it nowhere states its intention to repeal the common law rules of slander and nor can this be implied from any of its provisions.

The Civil Procedure Rules

[25] It is clear from Part 12 of the Supreme Court (Civil Procedure) Rules 2005 ("the Civil Procedure Rules") that a default judgment may be entered by the court office against a defendant in certain circumstances where such defendant has failed to file a defence in accordance with Part 10 and the claimant has complied with the procedure set out therein.

[3] Gatley on Libel and Slander 11th Edition at Paragraph 316 page 92
[4] See 28 Halsbury's Laws of England (4th Edition) Paragraph 49.
[5] See Section 3.
[6] See Section 6
[7] See Section 7.
[8] See Section 9.
[9] See Section 8.

[26] Part 2.6 of the Civil Procedure Rules spells out the position where the court office is permitted to perform any act, which court staff may perform such acts, and by Part 2.6(3), provides:

> *"Where a step may be taken by a member of the court staff:*
>
> *(a) That person may consult a judge, the Registrar, Deputy Registrar or Assistant Registrar before taking the step; and*
>
> (b) *That step may be taken by a judge, the Registrar, Deputy Registrar or Assistant Registrar instead of a member of the court staff."*

[27] Part 13 of the Civil Procedure Rules sets out the rules for 'Setting Aside or Varying Default Judgments entered under Part 12 (default judgments).

[28] Part 13.2 of the Civil Procedure Rules deals with cases (which do not apply to the present case) where the court must set aside default judgments (where such judgments were "wrongly entered").

[29] The rules, which are directly applicable to the present case, being Part 13.3(1) – 13.7 of the Civil Procedure Rules, set out the principles, procedure and other provisions for cases where the court may (as a matter of discretion) set aside or vary default judgments, which I set out in full as follows:

> *"13.3(1) Where Rule 13.2 does not apply the court may set aside a judgment entered under Part 12 only if the defendant–*
>
> *a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *b) gives a good explanation for the failure to file and acknowledgment of service or a defence, as the case may be; and*
>
> *c) has a real prospect of successfully defending the claim."*
>
> *(2) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.*

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

13.5 If judgment is set aside under Rule 13.3, the court must treat the hearing as a case management conference, unless it is not possible to deal with the matter justly at that time.

13.6 (1) When judgment is set aside under Rule 13.3, the court must treat the hearing as a case management conference, unless it is not possible to deal with the matter justly at that time.

(2) If it is not possible to deal with the matter justly at that time, the court office must fix a date, time and place for a case management conference and give notice to the parties.

13.7 Where the Respondent has abandoned any remedy sought in the claim form in order to enter a default judgment, the abandoned claim is restored if judgment is set aside."

[30] It is clear that all of the conditions of Part 13.3(1) have to be met (the application has to be made promptly, the applicant has to give a good explanation and must have a reasonable prospect of successfully defending the claim) before the court may exercise its discretion to set aside the default judgment.

[31] In relation to the condition that the Applicant has "a real prospect of successfully defending the claim" the prospect of success has to be 'real' as opposed to 'fanciful' with the burden being on the Applicant. In my view the application may succeed on this condition or ground if the Applicant can show some "prospect" or chance of success, provided such prospect is grounded on some real or tangible basis and is better than merely arguable.

[32] In the English Court of Appeal case of *Swain v Hillman and another*[10], Lord Woolf MR in interpreting a similar provision of the English civil procedure rules relating to summary judgment, authoritatively opined in delivering the judgment of the Court:

> *"It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objective contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible….*
>
> *Useful though, the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involved the judge conducting a mini trial, that is not the objective of the provisions; it is to enable cases, where there is not real prospect of success either way, to be disposed of summarily"*

[33] The English provision in relation to applications to set aside default judgments are not identical to that of Part 13.3 of the Supreme Court Rules of Belize as it is structured somewhat differently (i.e. does not require that a good explanation be given for failure to file a defence) and the court has an additional power to set aside or vary a judgment where "it appears to the court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim"; which power a Belize court does not

[10] [2001] 1 All ER 91

have. Thus, a court in Belize should be weary in slavishly following the decisions from England in their interpretation of its own provisions.

[34] It appears to me that, once the Applicant is able to satisfy its burden of establishing that the three conditions are met (including that there are "real" grounds to believe that the Applicant has a realistic prospect of success), the evidential burden may then shift to the Respondent to satisfy the court, in order for him to succeed, that there is no real prospect or chance of success.

[35] In determining whether there is some real prospect of success, the Court is thereby entitled to consider the merits of the case to the extent, and only to the extent necessary, to determine whether the Applicant's case has sufficient merit to proceed to trial.

The Issues

[36] There is no issue concerning the promptness of the application as the Respondent, quite correctly, concedes that the Applicant has applied within sufficient time to set aside the judgment.

[37] For the reasons which are explained hereinafter I consider that the central or real issues involved in the present application concern the quality of the Applicant's explanation (whether it is a good one) for his failure to file a defence, and the prospect of the Applicant successfully defending the claim, which, in my view, on the facts of the present case,(that allegedly the Claim does not disclosed any actionable wrong) amounts in reality to the same thing.

The Applicant's Submissions

[38] The Applicant submitted that his explanation that his conclusion (or discovery) that the claim disclosed no actionable wrong and was therefore an abuse of process was sufficient justification in law for not filing a Defence. Also that he was advised and believed that in the circumstances he did not have to file a defence as the court could exercise its discretion with such Affidavit to strike out the claim; and as a consequence he had a real prospect of successfully defending the claim.

[39] The Applicant, along with the draft Defence in which he puts forward as his defence to the claim also, in his second Affidavit, proffered the explanation for his failure to file a defence as the failure of the Respondent to establish that the person making the telephone call was the Applicant and to state that he has suffered any damages. The Applicant offered no other explanation for his failure to file a Defence.

[40] The Applicant submitted that under the laws of Belize, in relation to the law of slander, only women who are accused of un-chastity can bring a claim without proof of special damage. In support of this proposition the Applicant relied on Section 6 of the Libel and Defamation Act, Chapter 169, Revised Edition 2000, Laws of Belize, which state as follows:

> *"Words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable, but in any action for words spoken and made actionable y this section, a plaintiff shall not recover more costs than damages unless the judge certifies that there was reasonable ground for bringing the action."*

[41] The Applicant submits that these words in the Libel and Defamation Act, where mention is only made making words spoken and published (slander) actionable without proof of special damages (actionable per se) in relation to imputations of unchasitity or adultery to any woman or girl, there is no other basis under the laws of Belize for a claim to be brought for slander without the Respondent articulating that he has suffered special damages. That the Libel and Defamation Act in effect definitively contains all of the circumstances which constitute slanders which are actionable per se (without proof of actual damage) namely only those contained in this Act namely the provision of paragraph 6 as it relates to women or girls.

[42] The Applicant also relied on the judgment of Lord Coleridge, CJ, in the UK, Court of Appeal 1883 case of *Chamberlain v. Boyd* [11 Q.B.D], which involved a defamation claim brought by an unsuccessful candidate for election as member to a Club of which the Defendant was a member, subsequent to which election, at a

meeting of the members of the club called to consider changing the rules, the Defendant, in an effort to secure the exclusion of the plaintiff, falsely and maliciously spoke and published defamatory words of the Plaintiff, and thereby induced the members of the Club to retain rules under which the Plaintiff was excluded, and in which decision the learned judge authoritatively stated as follows:

> *"First, no damage is alleged in respect of which the law allows an action to be brought. To take the question most favourably for the plaintiff, the statement of claim merely alleges that the defendant falsely and maliciously, that is, with an intention hostile to the plaintiff, spoke and published words whereby a change in the mode of the election of candidates at the Reform Club was prevented, and the members of that club were induced to retain a mode of election which gave less chance of success to the plaintiff if his name would be put up at the club again. I am clearly of opinion that it would be dangerous to hold that these averments give a ground of action; the damage alleged is unsubstantial and shadowy, and is in truth incapable of being estimated in money; and where words spoken, as in the present case, are not actionable in themselves, they can become actionable only when they have been followed by pecuniary or temporal damage. The case is new and is unsupported by any authority of any previous decision, and the argument for the plaintiff is entirely opposed to the principles upon which actions of slander have been determined. I am not inclined to extend the limits within the law allows actions for defamation to be brought. Upon this ground alone, I think that the demurrer ought to be upheld."*

[43] The Applicant further submitted that the Respondent is the Prime Minister of Belize prior to and after the alleged impugned words. No special damages can be alluded to by the Respondent to substantiate the cause of action in the claim. Also, that the Statement of Claim was not proceeded with by a letter before action

of any sort to the Applicant; and the first the Applicant knew about the claim was when the Statement of Claim was served.

[44] That paragraph 6 of the Statement of Claim, alleging that by reason of the publication of the words complained of, the Plaintiff has been caused serious injury to his personal and professional reputation and has suffered considerable embarrassment and distress is not, in keeping with what the law requires, which is an articulation of special damages capable of being identified by money or some quantum. That throughout the Statement of Claim it cannot be found.

[45] It is also contended by the applicant that in reading the Statement of Claim, particularly representation of what is alleged for cause of action, there is nothing to suggest who is making the statements – it is not clear who the author is.

[46] That as a result the Applicant therefore has a real prospect of successfully defending the claim and the claim discloses no cause of action.

The Respondent's Submissions

[47] The Respondent very helpfully filed written submission on the 13th December 2013.

[48] It is submitted by counsel for the Respondent that the Applicant is seeking to deprive the Respondent of a regular judgment which the Respondent has validly obtained in accordance with the Rules of court, and this the court should not do so lightly.

[49] The Respondent referred to the inordinate and inexcusable delay and omission (almost 24 months) of the Applicant to do anything at all after acknowledgment of service; and the requirement that the Applicant must both give a good explanation for the failure to file a defence, and have a real prospect of successfully defending the claim.

[50] It was submitted that the proper inference to be drawn from the circumstances of the case was that the Applicant is admitting the claim as the Applicant's Affidavit provides no evidence or explanation for the failure to defend; but merely says there is no cause of action made out – contrary to his Acknowledgment.

[51] It was also submitted that there is no evidence of any prospect of success as there is no allegation of any defence at all to the claim. It is suggested that generally defences to this claim may include the following (none of which are proffered by the Applicant): truth; fair comment; a matter of public interest; and absolute or qualified privilege. None was alleged.

[52] It was also submitted that the Applicant saying in paragraph 6 of his Affidavit that: he "could not find that the claim disclosed any actionable wrong… It was at that point I realized that the filing of the claim was an abuse of process." is, in fact, wholly misconceived. That if the claim was an abuse of process, as alleged, then the Applicant ought to have applied to strike it out at minimum; should he not wish to defend it on that basis, but he did not so for over 24 months.

[53] The Respondent submitted that CPR 13.4(3) required that a draft of any proposed defence be exhibited to the affidavit, so, without a draft defence it cannot properly and legally[11] be said that the Applicant has a reasonable prospect of successfully defending the claim.

[54] That according to CPR 13.3(1)(b) & (a) the Applicant must show that his prospects of successfully defending the claim are "real" as opposed to "fanciful" – with the burden being on the Applicant to show this and so the defence relied on must be more than arguable, it must carry some degree of conviction.

Determination

[55] I have carefully reviewed the Claim Form and Statement of Claim and I am quite satisfied that the claim discloses the tortious wrong of slander against the Respondent which is actionable per se, as it (the Statement of Claim) clearly sets out allegations against the Respondent that he (the Applicant) spoke and published that the Respondent is a corrupt person and that in his office as Prime Minister he was deeply involved in corruption. Nothing has been shown to me which suggests that the Claim Form or Statement of Claim was bad in law or otherwise an abuse of process and was thereby liable to be stuck out.

[11] For non-compliance with Part 13.4(3) of the Rules of the Supreme Court.

[56] The allegations in the Claim Form and in the Statement of Claim were clearly that that the Applicant was the person who made the telephone call to the daily morning talk show and uttered the words the subject matter of the claim.

[57] Because the allegation in the claim form and the Statement of Claim concerns defamatory statements alleged (to wit the Respondent is a corrupt person or involved in corruption in such office or profession) and published by the Respondent, which were calculated to disparage the Respondent in, and in the way, and in relation to, his conduct of his office of Prime Minister of Belize, and in his profession as an attorney-at-law and a Senior Counsel, and imputes unfitness for or conduct in such office or profession, such claim is actionable per se and does not, in law thereby require claiming or proof of special damage.

[58] I also find that the Applicant's submission is wholly misconceived that under the laws of Belize, in relation to the law of slander, only women who are accused of un-chastity can bring a claim without proof of special damage, and that Section 6 of the Libel and Defamation Act, Chapter 169, Revised Edition 2000, Laws of Belize, establishes this. As I noted above the Libel and Defamation Act does not wholly repeal the common law in relation to defamation and slander but rather merely seeks to amend or modify such laws (which are creatures of common law) in various ways and, inter alia, makes statements imputing unchastity or adultery to any woman or a girl, actionable per se.

[59] In my view the judgment of Lord Coleridge, CJ, in the case *of Chamberlain v. Boyd* [11 Q.B.D], is wholly inapplicable as it was not a case of a slander which is actionable per se, such as the present case, but was in respect of a case, or facts and circumstances, in which the learned Judge found that the circumstances of the case were such that it would be "dangerous to hold that these averments give a ground of action; the damage is unsubstantial and shadowy, and in truth incapable of being estimated in money". These circumstances, in my view, bear no resemblance and cannot be made to apply (by any stretch of the imagination) to the present case.

[60] I also have no hesitation in finding that in the above circumstances the Applicant, if he intended to defend the claim, ought to have filed a defence and in fact there could have been no justification for not filing a defence, if the intention was, as disclosed in his Acknowledgement of Service, for him (the Applicant) to defend the claim. Indeed the Applicant's actions in not filing and serving a defence for nearly 24 months lends credence to the Respondent's submission that the Applicant not only had no real prospect of successfully defending the claim but fully appreciated that that was the case.

[61] Indeed by the filing of a draft Defence in his Second Affidavit on the 13th December 2013, it seems to me, the Applicant, correctly arrived at the conclusion, and is thereby conceding, that there was a necessity for him to have filed a Defence, quite apart from the need to comply with Part 13.4 (3) of the Supreme Court Rules, being an acceptance that it was necessary for him to have filed a draft Defence in support of his application to set aside the default judgment.

[62] As a consequence, upon failing to file a Defence the Respondent had no real, or otherwise, prospect of successfully defending the claim; and by failing to file an application to strike out the Claim and Statement of Claim this failure or default was thereby compounded; and which by doing nothing for so long (nearly 24 months) left the Applicant totally exposed to an application for a default judgment which, with the passing months, would have become more and more inevitable.

[63] I have come to the conclusion that the Applicant has not discharged the burden on him of showing some "prospect" or chance of success, much less a realistic prospect of successfully defending the claim. In addition I am not satisfied that the Applicant has established a good explanation for his failure to file a defence. If the Applicant had a good reason for not filing a defence, namely that he believed (even if erroneously) that the claim disclosed no actionable wrong, then this should have been followed by an immediate application to strike out the claim (which has never been made).

[64] Consequently, when the Respondent filed his Request for Entry of Judgment in default of defence on his claim, the Court Office (the Registry of the Supreme

Court which includes the Deputy Registrar as a member of the court staff who carry out work of a formal or administrative nature[12]), as provided by Part 12.5 Rules of the Supreme Court, was obliged to enter judgment for failure to defend, once the applicable conditions were met as contained in this part of the Rules.

[65] Upon subsequent and careful review of the court file it seemed to me that the conditions were generally met for the entry of a default judgment, subject to the exercise of discretion by the court on the terms of such default judgment.

[66] Upon such review, and in preparing this judgment, as the Respondent stated that he was in a position to prove the amount of damages, I formed the view that the court office was then obliged to fix a date for the assessment of damages giving the Applicant at least 14 days' notice of the date, time and place for the hearing as required by Part 16.2(2), which did not occur. In this respect the default judgment was irregular.

[67] Also, I might add, in my view, before taking the step of entering a default judgment in a claim which has been assigned to a Judge, then before a default judgment, such as in the present case, especially of the kind applied for in the present claim it would generally be preferable, although the rules do not require it, for the court staff within the court office, to consult with the judge who has been assigned to the case (which did not occur in this case).

[68] For the assistance of the court staff (including the Registrar or Deputy Registrar) it seems to me that claims of any complexity which include a claim not for a simple debt or for a specified sum of money, or one involving the legal interpretation of words spoken such as in a defamation claim (as the present case), where there may be some significant public interest, especially where a Judge has been assigned to the claim and an application has been made by the Respondent to fix a Case Management Conference (as in the present case), the assigned judge should be consulted by the court staff (including the Registrar or Deputy Registrar) before entering a default judgment, so that the judge may make a determination whether to exercise his or her discretion to take such a step instead

[12] See Part 2.4 Definition of "court office" and Rule 2.6(1)

of the court staff (or indeed the Registrar or Deputy Registrar) in question doing so, as alluded to by the provisions of Part 2.6(3) of the Supreme Court Rules.

[69] In such a situation a judge could have taken the opportunity to give effect to or to further the overriding objectives of the rules in the exercise of the court's undoubted discretion in the application of Part 13.3, and at any case management conference, by attempting to deal justly with the case, in the exercise of its case management powers.

[70] The default judgment having been correctly, if not slightly irregularly entered, it now falls on the court to consider whether it has a discretion to set aside or to vary the default judgment as applied for by the Applicant.

[71] There being no issue about the promptness of the application the court must first consider whether the Applicant has given a good explanation for the failure to file a defence.

[72] It is clear from what I have said above that no such explanation has been given by the Applicant and that the Applicant really has no real prospect of successfully defending the claim based on the arguments which he has raised. The Applicant ought to have filed a Defence and ought to have done so along with its application to set aside the default judgment (which I have not penalized him for doing as I have, in favour of the Applicant, dealt with the case on the basis that the draft Defence was properly filed).

[73] The existence of the irregularity in the default judgment (in not setting a date for the assessment) has given rise to the court considering, whether Part 13.3(2) of the Rules of the Supreme Court, in the circumstances of the above irregularity of the present case the default judgment, could instead be varied.

[74] On a careful reading of the present case and Part 13.3 I have come to the conclusion that as the conditions set for the exercise of the court's discretion have not all been met (promptness, good explanation for failure to file a defence and the Applicant having a real prospect of successfully defending the claim) the court

does not as a consequence have the discretion or power to vary the default judgment.

Costs

[75] As the Applicant has wholly failed in his application to set aside the default judgment dated 16th day of October 2013 and entered herein for the Respondent the appropriate order is for the Applicant to pay the costs of the application which I have determined to be $2,000.00.

Disposition

[76] For the reasons given above it is hereby ordered that the application by the Defendant/Applicant to set aside a default judgment dated 16th day of October 2013 and entered herein for the Claimant/Respondent is dismissed with costs in the sum of $2,000.00. .

The Hon. Mr. Justice Courtney A. Abel