Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. CL. B 055 OF 1997

BETWEEN	**DUDLEY**	**BURGESS**	**CLAIMANT**
AND	**EXTON**	**WYNTER**	**DEFENDANT**

IN CHAMBERS
Mr. Laurence Jones instructed by DunnCox for the claimant
Miss Tashia McDonald instructed by Lyn-Cook, Golding and Company for the defendant

November 18, December 13, 2005 and January 26, 2006

Sykes J

SECTIONS 70 AND 451 OF THE CIVIL PROCEDURE CODE, PARTS 12, 42 AND 73 OF THE CIVIL PROCEDURE RULES, 2002

1. This is a preliminary point that has arisen on an application to set aside judgment in default of defence. The question is whether the claim was still in existence after December 31, 2003, so that a judgment could be entered in February 2004.

2. The claimant, Dudley Burgess, sued the defendant, Exton Wynter, to recover one million, two hundred and seventy nine thousand, eight hundred dollars (JA$1, 279, 800). This was to recover money outstanding for work done and material used in respect of a construction of a house at Retreat in the parish of St. Thomas. The suit was launched, in 1997, by way of writ of summons endorsed with a claim for the sum already mentioned. The writ was served out of jurisdiction pursuant to an order made on April 21, 1997. Appearance, to use the terminology of the then extant Civil Procedure Code (CPC), was entered on May 21, 1998. Notice of change of attorney for the defendant was filed on July 3, 1998. On January 10, 2000, the claimant filed a notice of intention to proceed. Thereafter a number of documents and applications was filed which is best set out in chronological order.

Chronology of applications, filings and more

3. This is what occurred in the case after the notice of change of attorney was filed.

a. On May 4, 2000, the claimant sought to enter judgment in default of defence under the CPC. No judgment could be entered on this application because two affidavits were required; the affidavit of debt and the affidavit of search (see Downer J.A. in ***Workers Savings and Loan Bank Ltd v Winston McKenzie*** (1996) 33 J.L.R. 410, 412 and (see P.T. Harrison J (as he then was) in ***Benros Company Ltd and another v Workers Savings and Loan Bank and another*** (1997) 34 J.L.R. 92, 98 E – F). The only affidavit filed in support of this application was the affidavit of debt. This affidavit was filed on September 22, 2000...

b. On June 28, 2001, the claimant filed his statement of claim.

c. On May 2, 2003, December 19, 2003, January 28, 2004, and February 23, 2004, the claimant applied for default judgment under the Civil Procedure Rules (CPR) that came into force on January 1, 2003. The Registrar rejected the applications of May 2, December 19 and January 28, 2004.

d. Judgment was entered on the February 23 application.

e. On December 22, 2004, the claimant applied for sale of the land of question so that the proceeds could be used to satisfy the judgment. This attempt at enforcement injected life in the defendant. On March 15, 2005, he filed an application to set aside the judgment of February 23, 2004.

4. The matter came up for hearing on March 15 and May 17, 2005, but was adjourned. The adjournment proved fruitful. It was a time for intellectual rumination and gestation. It suddenly occurred to the defendant that the claimant had not applied for a case management conference before December 31, 2003 as required by the CPR (see rule 73). Neither did the claimant apply for restoration of the matter by April 1, 2004. This led to the ultimate submission: the claim was struck out automatically under rule 73 and so the entry of judgment on February 23, 2004, was of no effect. The reason for this, submitted Miss McDonald, ontologically speaking, was that there was no case in being after December 31, 2003 out of which a judgment could flow. Her submission can be reduced to ten words - no

claim, no judgment; no judgment, nothing to set aside. Consequently, any such application to set aside judgment is redundant. Is this correct?

5. Mr. Jones confessed and avoided the submissions of Miss McDonald's. He accepted them as correct but submitted that they were inapplicable to this case.

Rule 73

6. I shall examine rule 73 to see if Miss McDonald is correct. Part 73 of the CPR contains the transitional provisions that have established a regime to deal with the transition from the old CPC to the new CPR. The CPR has made a distinction between new proceedings and old proceedings. The expression, *new proceedings*, in the CPR, means any proceeding commencing after January 1, 2003. *Old proceedings* is any proceeding that began before January 1, 2003. This case is undoubtedly an old proceeding. Within the category of old proceedings there are two subcategories. I shall call them the Hilary term group and the non-Hillary term group. The Hilary term group is so called because the rule states that the CPR does not apply to any old proceedings in which a trial date has been fixed within the first term after January 1, 2003, which would be the Hilary term of the Supreme Court (see rule 73.3 (1)). The non-Hilary term group is any old proceedings in which a trial date has **not** been fixed to take place within the Hilary term. In this event the claimant must apply for a case management conference (rule 73.3 (4)).

7. Rule 73.3(7) is a guillotine. It states that where no application for a case management conference has been made by December 31, 2003, the proceedings (including any counterclaim, third party or similar proceedings) are struck out without the need for an application by any party. Any case not within the Hilary term group is automatically within the non-Hilary term group. It does not matter where proceedings have reached in a case within the non-Hilary term group; one must apply for a case management conference. Therefore, even if one has applied for judgment in default of defence, as in the instant case, and the documentation is in order, you must apply for a case management conference, even though one would be hard pressed to see what possible value could flow out of such an application at that stage of the proceedings. This means that the claimant was under an obligation to apply for a case management conference not later than December 31, 2003.

8. Relief can be granted if the claimant takes advantage of rule 73.4 (3) and (4). It allows an application to restore proceedings that have been struck out. The application must be

made by April 1, 2004. Miss McDonald made the point that there is no application before me for restoration of proceedings and so this part of rule 73 does not arise for consideration. She added, for good measure, that even if there were such an application, I would be precluded from extending time within which to apply for restoration because rule 26.1 (2) (c) does not apply to rule 73 (see Smith J.A. in ***Norma McNaughty v Clifton Wright and other*** SCCA NO. 20/2005 (delivered May 25, 2005, slip op at page 10). I agree with her submissions on this point. Smith J.A. in ***McNaughty*** stated that rule 73 provides the sanction and the relief. In short, rule 73 is completely self contained in that it states

- **a.** that the claimant must apply for case management if the case is in the non-Hilary term group;
- **b.** the consequences of non-compliance by December 31, 2003;
- **c.** what the relief is;
- **d.** the time within which the application must be made; and finally
- **e.** tells what criteria the judge is to use.

9. Mr. Jones, as I have said, accepts the correctness of Miss McDonald's submissions but says they have no application to the case before me because the case management regime assumes that there is a case to manage. By this, he meant that the case management regime does not apply to cases where a proper application for judgment in default of defence has been made before the December 31, 2003. He added that if the application is in order then any judgment entered should take effect from the date of the application. He added that the Registrar was wrong to reject the December 19 application on the grounds advanced by her. According to Mr. Jones (the note in the file bears him out) the sole reason for rejecting the December application was that the form has the words "Acknowledgement of Service YES/NO" struck through with a pen rather instead of being omitted from the form completely and the "NO" after "DEFENCE" was struck through with a pen.

10. He relied on the of ***Workers Savings and Loan Bank*** case for the proposition that judgment should take effect, in cases of judgment in default of defence, from the date of the request for judgment and not the date it is actually entered. Mr. Jones added that this principle was carried over into the CPR where rule 12.5 of CPR says that the registry **must** enter judgment at the request of the claimant against a defendant once the conditions specified in rule 12.5 are met. I should point out that no issue has been raised about whether the conditions in rule 12.5 have been met and I have decided the case on the basis

that they were indeed satisfied. If I am to get to Mr. Jones' conclusion on the date of judgment, it cannot be by his route because the ***Workers Bank*** case turned on a specific provision in the CPC (see section 451). I have not found any equivalent provision in the CPR. In the CPR, rule 42.8 says that the judgment or order takes effect from the day it is given or made unless the court states otherwise.

11. Having looked at the form rejected by the Registrar I am of the view that judgment should have been entered for the claimant on the December application. I do not believe rejecting the form for reasons stated is consistent with the overriding objective. However this point has become academic and will not be addressed further. I am extremely sympathetic to the claimant but the law is the law and regrettably, his matter has been struck out.

12. I should point out that the Court of Appeal has decided that publication of the list of case struck out is not mandatory (see Smith J.A. in the ***McNaughty*** case). This is so despite the use of the seemingly mandatory word **must**, not once but twice (see rule 73.4(1) and (2)).

Conclusion

13. The CPR establishes a regime to deal with old proceedings. There are only two categories of old proceedings contemplated by the rule. Those that have a trial date within the 2003 Hilary term and those that do not. Once the case is not within the category fixed for trial within the 2003 Hilary term after the CPR came into operation, then an application must be made for case management. The application must be made before December 31, 2003. The claimant in this case did not use that mechanism. His matter was automatically struck out after December 31, 2003, and so the only remedy would be an application to restore proceedings. This has not been done. Therefore, no claim existed on February 23, 2004, in which the default judgment could be entered. The preliminary point made by the defendant is upheld. Costs to the defendant to be agreed or taxed.