Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 1999/M117

BETWEEN	DONALD MANNING	CLAIMANT
AND	CLIFFORD EDMOND	DEFENDANT

Mr. Debayo Adedipe for the Claimant

Miss Grace Ann Cameron-Small instructed by Lyn-Cook Golding & Company for the Defendant

Heard: June 21, 2007 and September 21, 2007

Sinclair Haynes J

On the 18th April 2001 Interlocutory Judgment in Default of Appearance was entered against the defendant. The claimant obtained an order to proceed to Assessment of Damages on the 29th November 2001. The matter was set down for Assessment of Damages on the 2nd of November 2004. On the 9th November, the defendant appeared and the matter was adjourned to the 9th November 2005. The defendant applied to set aside the judgment and has since raised a preliminary objection that the court has no *locus standi* to deal with this matter because the matter has been automatically struck out by virtue of the claimant's non compliance with rule 73.4 (3).

Submissions by Miss Grace Ann Cameron-Small on behalf of Defendant/Applicant

Miss Grace Ann Cameron-Small submitted that the defendant's failure to comply with part 73 of the Civil Procedure Rules (CPR) results in the automatic striking out of the matter.

The claimant's action falls within the category of actions defined by the CPR as old proceedings since no trial date was set within the time prescribed. The claimant failed to apply for Case Management Conference (CMC) before the 31st December 2003. Consequently, the action was automatically struck out. The claimant relied on the case of **Norma McNaughty v Clifton Wright and Others** SCCA 20/2005. She further submitted that the claimant's failure to apply for restoration of his action within the prescribed period renders the court *funtus officio*.

Submissions by Mr. D. Adedipe

Mr. Adedipe submitted that Rule 73.3 (1) & (4) properly construed, only applies to old proceedings in which a trial date could be expected to be fixed. No trial date would be fixed in a matter where no defence had been filed. In the circumstances those rules do not apply to such matters. This case, he submitted, was one in which the time for filing a defence had long passed. A trial date would not be fixed because a default judgment had already been entered. Only a date was left to be set for Assessment of Damages. Further, he submitted, part 73 of CPR properly construed does not apply to a case in which judgment, whether default or otherwise has already been entered. The effect of the default judgment is to make a final determination between the parties as to liability. Whilst the judgment stands, the issue of liability is *res judicata.* He relied on the Privy Council decision of **Strachan v The Gleaner Co. Ltd**. Privy Council Appeal no. 22/2004 delivered on the 25th July 2005 and **Rhoden v Construction Developers Association** SCCA no. 42/2002 delivered on the 18th March 2005 at pages 9-10.

Mr. Adedipe submitted that the claimant has a vested right flowing from the default judgment since liability has been established. He submitted that even if the CPR

was a statute passed by Parliament, it could not be construed so as to deprive a party of a vested right.

He relied on **Craies on Statute Law** 7th edition pages 321 and 401. He further submitted that if the transitional provision applies to a matter in which a default judgment had already been entered, the rule would be *ultra vires* as the effect of the rule would be to set aside a judgment. He submitted that the rules of court have no such power.

Ruling

Re: Application of Transitional Rule to matters in which defence has not been filed

Mr. Adedipe submitted that generally matters in which defences have not been filed are not matters in which CMC applications are applicable since trial dates cannot be fixed. I do not agree.

Rule 27.3 (1) states:

> *"The general rule is that the registry must fix a Case Management Conference immediately upon the filing of a defence to a claim other than a Fixed Date Claim Form."*

However, with regard to old proceedings, the rule is clearly different.

Rule 73.3 (4) states:

> *"Where in any old proceedings, a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a CMC to be fixed."*

Rule 73.3 (1) states:

> *"These rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date."*

Failure to comply with Rule 73.3 (4) results in the automatic striking out of the matter. Rule 73.3 (8) states:

> *"Where no application for a Case Management Conference to be fixed is made by 31st December 2003 the proceedings (including any counter claim, third party or similar proceedings) are struck out without the need for an application by any party."*

The Rules Committee, in order to give effect to the overriding objective, deemed it necessary to bring all old proceedings within the ambit of the new rules. This serves to prevent old proceedings from being unaccounted for in the system and to ensure that those matters are dealt with expeditiously and are not left to 'fall through the cracks.' (See **Norma McNaughty v Clifton Wright and Others** SCCA 20/2005 (supra) and **Cardinal Glennie v the Attorney General** 1994/G143 delivered on 18th November 2005)

The transitional rules are therefore applicable to all old proceedings in which a trial date was not fixed to take place within the first term after the commencement date.

Re: Application of Transitional Rule to Default Judgment

The instant case was begun on the 12th May 1999. However, a default judgment was obtained in the matter on the 18th April 2001. Unless such a judgment is set aside, the judgment stands. The transitional provisions, therefore, cannot be applicable to such matters. It could not have been the intention of the Rules' Committee to seek to deprive the claimant of his judgment. I am fortified in this view by the statement of the learned authors of **Craies on Statute Law** 7th edition 401:

> *"Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied. "It is the general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its*

enactments, unless in express terms they apply to pending action, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure and do not extend to rights of action." For "it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly their bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, "it will be held to apply prima facie to all actions, pending as well as future."

(See Re **Joseph Suche & Company** (1875) 1 Ch D 48, 50 and **Gardner v Lucas** (1878) 3 A C 582, 603)

The principle was clearly enunciated by Polack C.B. in **Wright v Hale** (1860) 30 L J 40, 42. He said:

"I have always understood, that there is a considerable difference between laws which affect vested rights and those laws which merely affect the proceedings of court; as for instance, declaring what shall be deemed good service, what shall be the criterion to the right to costs, how much costs shall be paid, the manner in which witnesses shall be paid, or what witnesses the parties shall be entitled to, and so on ... I do not think a matter of that sort can be called a right in any sense in which Lord Coke in his Institutes has spoken of rights."

Re: Application of Transitional Rule to Assessment of Damages

Default judgment having been obtained, the matter was set for damages to be assessed. An Assessment of Damages is in fact a trial. A trial is therefore pending. In the circumstances does it mean therefore that the claimant ought to have applied for CMC? Having failed to apply, is the matter automatically struck out? The claimant already has judgment awarded in his favour. This amounts to a vested right. It is a

recognised rule that statute should be interpreted where possible so as to respect vested rights (see **Hough v Windus** (1884) 12 QBD 224, 237).

The courts have been careful to protect vested rights. In several cases judges have not allowed statutes to have retrospective operations although the language used by the legislators appeared to suggest that that was the intention. This is in an effort to protect vested rights (see **Craies on Statute Law** 7th edition 399).

In any event the rules governing the fixing of a hearing for Assessment of Damages are different. Whereas it is the duty of the claimant to apply for a CMC and hence apply for a date for the trial of the matter, the onus of fixing a date for assessment is on the registry. Rule 16.2 deals with Assessment of Damages after default judgment. This is the applicable rule to the instant case.

Rule 16.2(1) states:

"An application for a default judgment to be entered under rule 12.10(1) (b), must state –

a. whether or not the claimant is in a position to prove the amount of damages; and, if, so

b. the claimant's estimate of the time required to deal with the assessment."

(2) *"Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the Assessment of Damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing."*

Rule 16.3 deals with Assessment of Damages after admission of liability on a claim for an unspecified sum of money.

In the circumstances where the registry fixes a CMC, the use of the conjunction 'or' makes it is quite clear that it is not mandatory. Rule 16.4 deals with Assessment of Damages after directions for trial of issue of quantum. The direction for the trial of the issue of quantum may be given at CMC. The use of the word 'may' gives the judge discretion. CMC is but one of the areas in which directions can be given. It seems quite clear to me that with regard to assessment hearings CMC is not mandatory. In fact it is not required at all with regard to default judgment.

Assessment of Damages hearings although they would have been pending trials were not intended to be dealt with in the same manner as matters in which judgments were not obtained. The Civil Procedure Rules therefore treat the fixing of a hearing of an Assessment of Damages differently. Hence, the transitional rules are not applicable.

The court is therefore of the view that the claimant was not obliged to apply for CMC in the circumstances.

The defendant's preliminary objection is dismissed.