[2013] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. C.L. 2002/B095

| | | |
|---|---|---|
| BETWEEN | BANK OF NOVA SCOTIA JAMAICA LIMITED | CLAIMANT |
| AND | CARL STEPHENSON | 1ST DEFENDANT |
| AND | ILEEN STEPHENSON | 2ND DEFENDANT |

Mr. Ravil Golding instructed by Lyn-Cook, Golding & Company for Applicant/Defendants
Mr. Emile Leiba instructed by Dunn,Cox for Respondent/Claimant

**IN CHAMBERS**

Heard: 7th July 2012 and 26th April 2013

***Application to strike out pursuant to Civil Procedure Rules – Distinction between "new proceedings" and "old proceedings" – Rule 73.3(1) of New CPR Rules – Old proceedings not within Hilary Term within Non-Hilary Term – Case Management Conference – Whether default judgment automatically struck out for failure to comply with Rule – Whether judgment enforceable***

**MORRISON, J**

The less than timely delivery of this judgment is as a result of supervening circumstances. I hope that my apology will serve somewhat to assuage the anxiety caused thereby.

[1] The action from which the application at caption flows commenced by way of Writ of Summons and Statement of Claim on June 12, 2002. Therein the Claimant sued the Defendants, jointly and severally to recover the sum of JA$1,170,723.36 and US$3,874.00 being the balances due and owing on two local currency credit cards, one

dual currency card and one line of credit card which the Defendants realized through the auspices of the Claimant.

[2] In the alternative, the Claimant sought damages for breach of contract in that on or about September 1999 the parties entered into a credit in which the Claimant provided t the Defendants the use of credit cards and a line of credit on condition that the Defendants would pay to the Claimant, at stated periods, all outstanding balances together with interest thereon. The itemization of the particular transactions as is borne out by the Statement of Claim is worth its reproducing:

| Account Number | Interest Rate | Balances at 4/6/02 |
|---|---|---|
| a) Scotia Line A/C No. 714742825102374 | 26.75% | JA$1,053,556.42 |
| b) Master Card currency A/C No. 5443112839994955 | 44.75% | JA$114,383.61 |
| c) Master Card Dual currency A/C No. 5443112830004955 | 18.0% | US$3,874.20 |
| d) Visa Card A/C No. 4487940020007853 | 44.75% | JA$298,287.31 |
| e) Visa Card A/C No. 4487932010003166 | 44.75% | JA$32,595.02 |
| Total | | JA$1,710,723.36<br>US$3,874.20 " |

[3] There is a dispute as to whether the first Defendant was ever served with a copy of the Writ of Summons and Statement of Claim as sworn to by a Mr. Ruel Gibson on November 20, 2002. However, I need not resolve that issue. The second Defendant was not served, she being deceased at the time of the attempted service upon her. Ensuing therefrom on November 20, 2002 the Claimant made an unsuccessful Request to enter judgment against the first Defendant. However, that Request was refused by the Registrar owing to the fact that the said Request was not in order.

[4] Having failed to enter judgment at the aforementioned time the Claimant prosecuted no further action until August 30, 2007 when judgment in Default of Acknowledgment of Service was secured against the first Defendant in the sum of JA$4,036,315,50 with interest thereon at 6% per annum from the date of judgment together with US$7,517.65 plus interest at the rate of 3% per annum from the date of judgment to the date of payment.

[5] Armed with that judgment, on July 24 2009 the Claimant obtained an Order for Seizure And Sale of Goods. Acting on the authority of the Warrant the goods of the first Defendant were either actually or constructively seized thus precipitating the current application.

[6] From the Interlocutory Judgment in 20 November 2002 it appears that items d) and c) were settled. I will at this juncture refer to the November 20, 2002 Affidavit of Debt of Ms. Kerry-Ann McKoy Tullock, attorney-at-law, in which she depones at paragraph 3 that "the defendants have paid nothing on account ..and there is now bona fide due and payable … the sum of US$3,874.26 and JA$1,710,723.36 <u>together with interest thereon at the rates outlined in the Statement of Claim and costs.</u>" (My emphasis)

[7] Let me now revert to what I consider to be a crucial acknowledgement on the part of the Respondent/Plaintiff: "The Defendants failed to file an appearance in the suit within the time stipulated by the Civil Procedure Code:. As a result of that failure "the Plaintiff filed a judgment to be perfected on 30th November, 2002. On the said date, the Plaintiff also filed an Affidavit of Debt, an Affidavit of Search and an Affidavit of Service in the Supreme Court Registry. However, the said judgment was not perfected as the Plaintiff was advised by the Registrar of the Supreme Court that proof of the interest claimed at the rates of 21.5%, 48.50% and 18% respectively should first be provided."

The reference to the Registrar's requisition dated 11th July 2003 states: "Kindly file request for default judgment … NB Judgment should not be entered for tabulated amounts. Kindly file copy of agreement."

[8] Months later the Registrar on 10th November 2003 made further requisition of the Plaintiff: "Please file request for default judgment. Judgment should not be entered for tabulated sum. Agreement, file, documents of court indicate various interest rates shown. Please therefore reconcile the rate of interest in the statement the Affidavit of Debt and judgment". From the records another Request for Default Judgment was filed on August 30, 2007 in which, *inter alia,* the amounts claimed and the rates of interest per annum for each transaction were included, ostensibly in answer to the Registrar's requisition. On the said day of August 20, 2007 Judgment in Default of Acknowledgment of service was entered.

***The Submissions***

[9] Mr. Golding submits that as the application was filed on 12th June 2002 and that as the application was not completed before the Civil Procedure Rules 2002 (CPR) came into force then the Plaintiff ought to have had regard to Rule 73.3(4) of the CPR. That is to say, the Plaintiff had a duty to apply for a Case Management Conference date to be fixed seeing that judgment was obtained on 30th August 2007.

As the Plaintiff did not so do then the Claimant's case was automatically struck out. Accordingly, there was not in place an enforceable judgment as at December 31, 2003.

In support of the above submissions reliance was placed on **Norma McNaughty v Clifton Wright and Another,** S.C.C.A. 20/2005 delivered on May 25, 2005.

[10] Not so say Mr. Leiba. As the argument goes, on 10th August 2007, after the Plaintiff had filed a Request for Judgment and as judgment was entered on the same day, the Plaintiff's application for an Oder for Seizure And Sale of Goods against the first Defendant, was quite in order. It was in order, says he, as the judgment which was filed on November 20, 2002 appeared to have satisfied all of the procedural requirements of Sections 69 and 70 of the Civil Procedure Code (CPC). A *fortiori*, the judgment ought to be entered by the learned Registrar and dated the day on which the application was made to the Registrar. The Plaintiff/Respondent reposed implicit faith in the decisions of **Workers Savings and Loan Bank v Winston McKenzie and Others** (1966) 33 JLR 410 and **Sagicor Life of Jamaica Limited (previously known as Life**

**Of Jamaica) v Broadway Import Export** Limited **v Richard Morgan** Claim C.L. 1998/L068 decided on November 24 2009.

***The Issues***

[11] The larger dimensions of the issue thrown up by the application is whether in August 2007 there was an enforceable judgment.

A secondary issue, is to ask and answer whether by virtue of Rule 73 of the CPR, assuming that the claim was alive, can it be deemed to have been automatically struck out and, consequently, to have been rendered of no legal effect.

***The Law***

[12] Rule 73 of the CPR is the framework which guides the transition from the CPC the CPR. According to the CPR there is a distinction to be made between "new proceedings" and "old proceedings". The former refers to any proceedings commenced after January 2003 whereas the latter refers to proceedings that began before January 1, 2003. Within the old proceedings category there is a further sub-category of what is described as the Hilary Term Group and the Non-Hilary Term Group. The Hilary Term Group is so called because the CPR does not apply to any old proceedings in which a trial date has been fixed within the first term (Hilary) after January 1, 2003, while the Non-Hilary Term Group is any old proceedings in which a trial date has not been fixed to take place in the Hilary Term.

[13] Rule 73.3 supplies the pivot of the application at bar. It is intituled "Old Proceedings". It reads, where relevant,

> "1) …
>
> 2) …
>
> 3) …
>
> 4) 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 t apply for a Case Management Conference to be fixed

5) …

6) when an application under paragraph (4) is received, the registry must fix a date, time and place for a Case Management Conference under Part 27 and the claimant must give all parties at least 28 days notice of the date, time and place fixed for the Case Management Conference

7) these rules apply to old proceedings from the date that notice of the case Management Conference is given

8) where no application for a Case Management Conference to be fixed is made by 31st December 2003 the proceedings .. are struck out without the need for an application by any party

9) … ."

[14] It is to be noted that although under Rule 78.3(8) the old proceedings is automatically struck out upon failure to abide the direction that an application for case management date be made by the 31st December 2013, the offending litigant is given an opportunity to restore the proceedings . Accordingly, under Rule 73.4(1) "A list of all proceedings which have been struck out under Rule 73.3(7) must be displayed in a prominent position in the registry between 1st January 2004 and 31st March 2004." By Rule 73.4(2), in addition to the aforementioned list displaying the proceedings which have been struck out, such a list must be advertised in a newspaper or general circulation up to those times not less than two weeks apart.

Rules 73.3(3) and (4) grant to the offending litigant the opportunity to apply to restore the proceedings by 1st April 2004. Such an application, according to Rule 73.3(5), must be on notice to all other parties and must be supported by evidence on affidavit.

[15] Upon the receipt of such an application the Court may restore the proceedings only if a good reason is given for failing to apply for a case management conference as directed by Rule 73.3(4); the applicant has a realistic prospect of success in the

proceedings; and the other parties to the proceedings would not be more prejudiced by granting the application than the applicant by refusing it: See Rule 73.4.

[16] Indeed, says Rule 73.5, where the former rules still apply and the court has to exercise its discretion, it may take into account the principles set out in the CPR, in particular, Part 1 (the overriding objective) and Part 25 (Case Management).
I now turn to the CPC to determine the framework for the entry of default judgment.
According to Section 69 of the CPC, "where any defendant fails to appear to a writ of summons and the plaintiff is desirous of proceeding upon default of appearance under any of the following sections … he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be."

[17] One such section under reference of Section 69 is Section 70. It reads: "where the Writ of Summons is indorsed with a claim for liquidated demand, whether specially or otherwise, and the defendant fails … to appear thereto, the plaintiff may, on an affidavit of service of the writ, and of such non-appearance as aforesaid, and to the effect that the debt is due and payable and still subsisting and unsatisfied, enter final judgment for any sum no exceeding the sum indorsed on the writ together with interest at the rate specified (if any), or (if no rate specified) at the rate of six per centum per annum, to the date of the judgment and costs." (Emphasis added)

[18] Let me now train attention upon the cases cited in support of the respective contentions. The **Workers Savings & Loan Bank** case is clear authority for the principle that once a judgment in default was filed in accordance with Section 45 of the CPC, that is to say, that the proper documentation of affidavits of service, search and debt and final order and that such documentation was in order then the Civil Registrar had an obligation to enter judgment. Such a judgment took effect from the date of filing of the request for judgment.

[19] In **Norman McNaughty v Clifton Wright And Others** S.C.C.A. No. 20/2005, delivered on May 25, 2005, is a case on procedural appeal concerning the extension of

time within which to apply for the restoration of proceedings which were automatically struck out pursuant to Rule 73 of the CPR. In that matter the Court rejected the view that Rule 73.4(4) must be read subject to Rule 26.1(2)c) in order to give the Court a general power to enlarge time for making an application for the restoration of proceedings struck out by virtue of Rule 73.3(7). The case at bar, however, does not involve the Court's discretion in extending time so as to achieve compliance with Rule 73 of the CPR and is thus distinguishable from the **McNaughty** case.

[20] In **Holiday Inn Jamaica Inc. v Carl Brown** S.C.C.A. No. 33 of 2008, is authority for the proposition that Rule 73.3(8), that is, the transitional provisions, cannot operate to strike out a default judgment existing prior to December 31, 2002. In that judgment was revived the distinction between proceedings with trial dates set for the Hilary Term 2003 and other proceedings, the non-Hilary Term 2003 cases.

[21] The issue generated by the **Holiday Inn Inc.** case was whether the transitional provisions of P{art 73.3 of the CPR applied to a default judgment entered before January 2003. In the course of the Court's judgment, Smith, JA said "that the provisions of Rule 73.3(8) have the effect of striking out 'old proceedings' that do not have trial dates in the Hilary Term and for which no application has been made for case management." However, emphasized his Lordship of appeal, the transitional provisions do not apply to a judgment in contradistinction to proceedings, to which they apply, arguing that the proceedings commenced by way of the filing of a writ and ended on the entering of a default judgment thus making the issue of liability *res judicata.*

Further along, Smith, JA said "… if Part 73 is to be regarded as applying to default judgments with damages to be assessed it would apply on so far as assessment of damages is concerned. In this case, since no date was set for the assessment of damages, the effect of the application of Rule 73.3(8) would be to strike out only that aspect of the proceedings relating to the assessment of damages".

The result of that abstraction would be, he rhetorically opined, that the default judgment would not be governed by the old rules as they no longer apply and would not be subject to the now rules because it was not incorporated under the new regime. But as

that would be tantamount to invite reason to balance on the peak of irregularity he held that Rule 73.3(8) was not designed to apply to old proceedings in respect of which default judgments have been obtained. Accordingly, he pronounced, that "By virtue of Rule 2.2(4) there exists a window for bringing old default proceedings under the new rules." That rule he asserts contains general provisions that would apply to proceedings which by their peculiar nature were not contemplated by Part 73 and to which Part 73 would therefore be inapplicable. The above judgment is instructive in laying the foundation as to the status of a judgment *vis-à-vis* the old rules and the new rules in the light of the transitional powers.

[22] In **Conrad Graham v National Commercial Bank Jamaica Limited**, S.C.C.A. No. 37/2009, Morrison, JA with whom Panton, P and McIntosh, JA (as she then was) agreed allowed an appeal from Frank Williams, J(Ag.) as he then was, on the basis that the action against the appellant had been automatically struck out pursuant to Rule 73.3(8) of the CPR.

[23] The relevant background facts are that by way of a specially endorsed Writ of Summons the Respondent, a commercial bank, filed an action against a Mr. Dexter Chin, Money Traders and Investment Ltd., Messers Conrad Graham, Mr. Ewart Gilzene and Mrs. Sharon Gilzene, to recover the sum of $56,271,915.00. The appellant Mr. Conrad Graham was sued as one of the guarantors of the debt of Money Traders and Investment Ltd. An affidavit of service attested to the appellant having been served with the writ and no appearance having been entered on behalf of the appellant, on 10 January 2000 the Respondent filed a Request with the Registrar of the Supreme Court for judgment in default of appearance in the sum of $56,271,915.00 with interest thereon at 75% per annum. The Registrar deemed that the Request was not in order as it failed to indicate the date from which interest was to run.

[24] Following upon a requisition from the Registrar the Request was filed on 20 March 2000 for the amended sum of $50,271,915.00 with interest at the rate of 75% per annum from the 14th day of May 1997 until the date of payment of judgment. Yet

another requisition was issued by the Registrar for the Respondent to provide a copy of the promissory note supporting the rate of interest as claimed. That requisition was not honoured in the result that the default judgment in default was not entered before 31 December 2003, in defiance of Rule 73 of the CPR. In particular and as already adverted to Rule 73.3(8) provides that where no application for a case management conference was made by 31 December 2003, the proceedings are struck out without the need for an application by any party. It is to be noted that up to 31 December 2003 no application was made for a case management conference date to be fixed.

[25] On 30 April 2004 the Registrar by way of another requisition to the Respondents attorneys-at-law asked for the request to be refilled and on 14 May 2004 the Respondent acceded with an engorged judgment of $351,699,467.00 with interest continuing at the rate of $722,670.12 per day, and costs in the amount of $24,000.00. On May 14, 2004, the Registrar entered judgment in favour of the Respondent for the sums as indicated.

[26] Sometime later on an application by the Respondent to have the proceedings restored Wolfe, CJ made orders that the claim and first Defendant's counter claim are hereby restored; the claim against the 4th and 5th Defendants stand dismissed; and, there will be no order as to costs.

[27] Three years elapsed before the Appellant applied to have the judgment set aside. The notice to set aside was amended to incorporate "that upon setting aside the judgment entered against the 3rd Defendant" the Court was invited to declare that the claim against the 3rd Defendant had been automatically struck out on account of the Claimant's failure to apply for a Case Management Conference. It was the rejection of the application by Frank Williams, J (Ag.) that ushered in the appeal.

[28] Two questions occupied the contemplation of the Court of Appeal: whether the request for default judgment in 2000 could be said to have been in order, whether the March 20, 2000 request by the Registrar was itself in order. To the first question

Morrison, JA said, "it seems clear that the subsequent refilling on 20 March 2000 in response to the Registrar's requisition with regard to the date from which interest was to run was an implicit acknowledgment by the respondent that the first request was not in fact in order." (Emphasis mine)

[29] In relation to the second question Morrison, JA determined that the request was not in order as the judgment itself was not in proper form, requesting as it did the entry of judgment with interest beyond the date of judgment in a context where Section 70 of the CPC specifically limited the entry of final judgment to any sum not exceeding the sum indebted on the writ, together with interest at the rate specified (if any), or (if no rate e specified) at the rate of six percent per annum, to the date of judgment and costs." It appears that their Lordships were not prepared to say that it was open to the Registrar to have amended the 20 March 2000 judgment by deleting the offending words of "until the date of payment of the judgment" so that in effect the judgment she would then have had to enter would have had to be in terms of the 2000 request. Instead, observed, Morrison, JA "what actually happened was that, having updated the figures to include interest at 75% per annum to 14 May 2004, the judgment entered on that date was for an amount almost double that for which it could have been entered in 2000." (Emphasis mine) In the upshot it was unmaintable that the 2004 judgment was a 'mere amendment' of the 20 March 2000 request for judgment.

[30] Ultimately, the question to be resolved in the current imbroglio is whether the requisition of the Registrar pursuant to which the re-filed judgment was enter constituted a mere amendment to the request for entry of judgment on November 29, 2002. It seems to me, based on the judgment of in the **Conrad Graham** case, that the Plaintiff's filing for judgment on the 20th day of November 2002 was not in proper order as it offended Sections 69 and 70 of the CPC in that, the permission to enter final judgment for any sum not exceeding the sum indorsed on the writ must also be indorsed … "with interest at the rate specified (if any), or (if no rate specified) at the rate of six per centum per annum, to the date of the judgment and costs." However, such a

Plaintiff is obliged to file an affidavit of debt to the effect that the debt is due and payable and still subsisting and unsatisfied.

[31] In the instant case, the affidavits of debt and search were filed. However, it is plausible that the re-filing by the Plaintiff of a Request for Judgment in Default on 30 August 2007, approximately five years later, to borrow the expression of Morrison, JA, "was an implicit acknowledgement by the Respondent that the first request was not in fact in order." In fact the second Requisition bespeaks the fact that the application was not in order. Further, I do not see where any objection was raised to the Requisition of the Registrar.

I will venture to say that it appears to be the policy of Sections 69 and 70 is not to encourage a Plaintiff who has fouled the said Rules to be allowed to derive from that fouling an enlarged judgment by protracting to purge that said foul of its offending as requisitioned by the Registrar. Surely, had judgment been entered on 20th November 2002 it would have been substantively less than that which was in fact entered on 30th August 2007. The last Request for judgment by the Plaintiff was not a mere amendment to the first Request for judgment as it had now engorged a debt that had now quadrupled.

[32] In these circumstances I hold that the proceedings had been struck out by virtue of Rule 72.3(7) of the CPR as no application for a Case Management Conference had been made by December 31, 2003. The failure of the Plaintiff to apply to restore the proceedings by April 1 2004 was fatal resulting in the Execution of the Writ of Seizure And Sale being a nullity.

[33] I hereby grant the orders as prayed for the orders sought in the Application for Court Orders in terms of orders 2 and 3.

Leave to appeal is granted to the Applicant. Costs to Applicant to be agreed or taxed.