IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. 2000/B110

IN CHAMBERS

BETWEEN	CARL BARRINGTON BROWN	CLAIMANT
AND	HOLIDAY INN JAMAICA INC.	DEFENDANT

Ms. Marsha Smith instructed by Earnest A. Smith & Co. for Claimant.

Mr. Wendel Wilkins instructed by Mr. Gregory O. Reid of Ziadie, Reid and Co. for Defendant.

Practice and Procedure – Default Judgment entered prior to the introduction of the CPR – No application made for case management conference – Whether claim struck out in accordance with the provisions of rule 73.3 of the CPR

26th June and 7th July 2008

BROOKS, J.

On 2nd October 2000 attorneys-at-law for Mr. Carl Brown entered judgment in default of defence, with damages to be assessed, against Holiday Inn Jamaica Inc. Mr. Wilkins, on behalf of Holiday Inn, now submits that because Mr. Brown's attorneys-at-law failed to request a case management conference prior to 31st December 2003, Mr. Brown's claim now stands automatically struck out.

The issue for resolution is whether the transitional provisions of the Civil Procedure Rules (CPR) may operate to set aside a default judgment.

The provisions of Part 73

The law regarding the transition of cases from the jurisdiction of the Civil Procedure Code (CPC) ("old proceedings") to that of the CPR, has been generally well settled by the decisions of the Court of Appeal in *Norma McNaughty v Clifton Wright and others* SCCA 20/2006 (delivered 25/5/2005) and *Ian Wright and others v Workers Savings & Loan Bank* SCCA 26/2006 (delivered 2/6/2006). The principles emanating from those judgments may be distilled and enumerated as follows:

1. There were two groups of cases categorized as "old proceedings" in existence at 31st December 2003, they may be termed the "Hilary term group" and the "non Hilary term group";

2. The Hilary term group were cases in which a trial date had been set for hearing within the Hilary term of 2004;

3. Claims in cases in the non-Hilary term group stood automatically struck out if the claimants (or defendants with ancillary claims) failed to apply on or before 31st December 2003 for a case management conference to be fixed;

4. There was a window of opportunity for revival, if an application was made on or before 1st April 2004;

5. The court has no discretion to enlarge the time within which the application for reinstatement may be made;

6. If the Hilary term group case was not disposed of at the scheduled date of its hearing in the Hilary term, then (generally speaking) the case fell thereafter under the jurisdiction of the CPR;

Smith, J.A. stated in *McNaughty* (at page 10) that, "Rule 73...provides its own regime for dealing with the transition from the [CPC to the CPR]". The formidable Sykes, J., not unexpectedly, has also contributed to the jurisprudence in this matter. In *Burgess v Wynter* C.L. 1997 / B. 055, (delivered 26/1/2006) Sykes, J. assessed the provisions of part 73 in the context of a default judgment. The learned judge's comments must be considered in arriving at a decision in this matter. He stated at paragraph 7 of the judgment:

> "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." (Emphasis supplied)

This statement undoubtedly expresses the law as emanating from the rulings of the Court of Appeal as described above. The question is, as stringent as the language in the section highlighted above appears to be, do these statements impute a requirement that non-Hilary term proceedings be struck out, where judgments in those proceedings, were in existence as at 31st December 2003.

Analysis of the instant case

In applying the abovementioned principles to the present case, it must be observed that a major difference between the fact situation in the instant case and that in all three cases mentioned above, is that, in the cited cases, no judgment was in existence as at 31st December 2003. In *Burgess,* the default judgment was entered **after** 31st December, 2003.

Analysis of the instant case is best made after setting out the provisions of rule 73.3 (4). It states:

> "Where in any old proceedings a trial date has not been fixed to take place within the [2003 Hilary term], it is the duty of the claimant to apply for a case management conference to be fixed."

It is not disputed that there was no fixture for the assessment of damages in this case during the Hilary term of 2004. It has been said (albeit in the context of the CPC, but I find the reasoning equally applicable to the CPR), that the word "trial", is not restricted to cases where liability **and** damages are required to be determined, but also includes cases where damages only are to be assessed (see *Mills v Lawson and Skyers* (1990) 27 J.L.R. 196 at p. 197). On this interpretation the word "trial" in the context of rule 73.3 (4) could possibly include an assessment of damages.

Since it is not disputed that there was no fixture for the assessment of damages in this claim during the Hilary term of 2004 (that is, no "trial

d: :"), and since this claim is obviously "old proceedings", was Mr. Brown u: er a duty to apply for a case management conference to be fixed, and u: n his failure so to do, was his claim rendered struck out? The answer, in th context of rule 73.3 (4), would seem to be in the affirmative, to both q: stions. I am, however, uncomfortable with such an answer. My d: comfort lies in the status of the default judgment.

S: tus of a default judgment

A judgment (even a default judgment), of this court is something of v: ue; it must be obeyed until it is set aside. A default judgment is, ac: nittedly, usually the result of administrative action (and so it was in this c: e). In my view, however, it may only be set aside by a judicial process. Th is is so, regardless of whether the regime is that of the CPC or of the CPR. S: pport for this position may be found at paragraphs 16 and 28 of the ju: gment of the Privy Council in *Strachan v The Gleaner Co. Ltd and anor.* P: A 22/2004 (delivered 25/7/2005). Is it permissible for a rule of p: cedure, especially without specifically so stating that to be the intention, t: set aside a judgment of this court? I answer in the negative.

It has oft been said, that the CPR, being rules of procedure, cannot o: erride the provisions of a substantive Act of Parliament. A case in point is th observation of Sinclair-Haynes J. in *Armstrong v DPP* 2004 HCV 1655

(delivered 29/7/2004) concerning the dichotomy between provisions of the Bail Act and rule 58(1) of the CPR. Her Ladyship ruled that "the Civil Procedure Rules are subordinate to the Bail Act. The Bail Act takes precedence". I respectfully agree with my learned sister.

I take a similar stance in respect of judgments of this court. They cannot be set aside inferentially, by rules of procedure. Such rules may provide for the method for setting aside a judgment but cannot otherwise achieve that result. In my view rule 73 cannot and does not, provide for the setting aside of a judgment of this court.

Alternative grounds

This finding brings to an end the application, as it was argued. There was an affidavit before me which would have supported an application to set aside the default judgment on the basis of irregularity. I did not have the benefit of seeing any affidavit in response nor did I have the benefit of arguments on the point. I therefore shall make no ruling in that regard, but will allow submissions on the point. This is because there is an onus on the court to ensure that its process is not abused. The court is also obliged to set aside any judgment which has been irregularly obtained.

Conclusion

Although the decided cases on the interpretation and application of rule 73 of the CPR seem to stipulate that there are only two categories of "old proceedings" for the purposes of the CPR, those cases dealt with a situation where there was no judgment of the court in existence in the claim on 31st December 2003. I find that rule 73 cannot and does not, seek to strike out a claim where a judgment of the court exists as at that date. In the circumstances there is at least a third category of "old proceedings", namely, claims where default judgments have been entered prior to 31st December 2003. It may well be that cases in this third category fall within the purview of rule 73.5, but, in the absence of submissions on the point, I need only find that the claim has not been struck out pursuant to the provisions of rule 73.3.

I, therefore, make the following orders:

1. It is declared that the claim herein has not been struck out by the provisions of rule 73.3 of the Civil Procedure Rules;
2. the application to set aside the default judgment herein, will be further considered on 11th July 2008 at 9:00 a.m. for 45 minutes;
3. costs of this application to the Claimant to be taxed if not agreed.