IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E 227 OF 2002

BETWEEN	ROHAN COLLINS	1ST APPLICANT
	SONIA COLLINS	2ND APPLICANT
AND	WILBERT BRETTON (On behalf of Claudette Davis-Bonnick)	RESPONDENT

Mrs. Ingrid Lee Clark-Bennett and Miss Maureen Smith instructed by Pollard Lee Clark & Associates for the applicants.

Mrs. Marvalyn Taylor-Wright instructed by Marvalyn Taylor-Wright & Co. for respondent.

Heard: May 22 and 26, 2003

JONES, J. (Ag.)

This court has made no secret of its growing impatience with the attitude of litigants who through either inadvertence or just plain neglect have refused to approach their cases with the necessary dispatch and expedition. These concerns have found expression in the new CPR 2002, which, subject to the overriding principle that justice must be done, has taken a position against the unnecessary waste of time and resources that has plagued civil litigation in the courts. It is against this background that the present action has been brought by the applicants in this case.

On May 6, 2003, the respondent and the 1st applicant came before this court on a Vendor and Purchaser Summons requesting a number of declarations. The 2nd applicant did not appear and the 1st applicant appeared in person without his

attorney. It was apparent from the record that his attorney was still in the matter as there was no notice for change of attorney filed. The court allowed the 1st applicant time to ascertain the reason for his attorney's absence but none was forthcoming. The court made the usual enquiries about the firmness of the 1st applicant's instructions and was given the assurance that all arrangements had been made to satisfy his attorneys. In addition to the absence of their attorney the applicants filed no affidavit in response to the respondent as is required in these matters. The court took the view that there was no good reason for the adjournment and requested the 1st applicant to proceed on his own behalf. At the end of the respondent's case the 1st applicant chose not to produce an affidavit or to give oral evidence on his behalf - in effect closing his case. Judgment was reserved for a date to be announced.

On the following day, May 7, 2003, the 1st applicant filed a notice of change of attorney and an application under Part II of the CPR 2002 for court orders requesting:

> *"That permission be granted to the defendants herein to present their response to the Honourable Mr. Justice Roy Jones"*

The grounds for this request were that:

1. *"The justice of the case demands that all the facts and evidence be before the court for the just disposition of the matter in accordance with the overriding objective pursuant to rule 1.1 (1) and 1.1 (2) (a) and 1.1 (2) (b) of the Civil Procedure Rules 2002.*
2. *The defendants' failure to be ready on 6th May 2003 was due to their impecuniosity; their inability to pay the fees of their previous attorneys at law which circumstance was completely outside of their control.*
3. *That the court is empowered to deal with the case at any time it deems appropriate pursuant to rule 2.7*

In his affidavit in support the 1st applicant said:

> *"4. ...That on the 5th day of May, 2003, I received a call from a Secretary of Gifford, Thompson & Bright informing me that my case was set for hearing the*

following day and as I did not pay their retainer in full no Attorney-at-Law will go to Court for me. This was the first time I was being advised of the Court hearing.
5. That on the 6 day of May, 2003 I attended the hearing of this matter. I was not able to adequately explain why I was without representation. I could not afford to pay the legal fees of my previous Attorneys-at-Law. This was due to financial hardships facing myself and my family which were beyond my control.
6. On the 7 day of May 2003, I retained the services of Attorneys-at-Law herein, whose fees I can afford. It is always been my intention to defend and resist the Plaintiff's claim. I was prevented from doing so because of my impecuniosity."

In addition to the above affidavit the 1st applicant filed an affidavit in response to the Vendor and Purchaser Summons together with numerous exhibits attached thereto. In a word, he was now ready to proceed with his matter.

Simply put, the issue is whether or not this court should exercise its discretion to allow the applicant - in effect to reopen his case, and be given a second chance - to give evidence in response to the respondent's affidavit after the hearing has ended but prior to judgment being delivered?

Although this case was filed before the coming into being of the Civil Procedure Rules 2002, the rules and practice directions there under makes it applicable to this case. As a result, although numerous authorities were cited by both attorneys in this matter, they were all decided prior to the advent of the new rules and are by and large irrelevant to this matter. In ***Biguzzi vs. Rank Leisure*** **[1999] 4 All ER 934** the United Kingdom Court of Appeal considered the resulting effect of the new rules in the U.K governing civil procedure during the transition period held that:

"Where the CPR applied, earlier authorities on matters of civil procedure were no longer generally of any relevance. Thus, although a judge should not ignore the fact that parties had previously been operating under a different regime, he did not have to make the same decision as would have been made previously"

It is with that in mind that we can consider the application of the CPR 2002, Part I to this case. The CPR r.1.1 provides as follows:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes:

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
(b) saving expense;
(c) dealing with it in ways which take into consideration -
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

r.1.2 provides that:

The court must seek to give effect to the overriding objective when it:

(a) exercises any discretion given to it by the Rules; or
(b) interprets any rule.

It is apparent from the new rules that the court is no longer restrained to consider only the position of the actual parties in the litigation before it, but must also consider the effect of the conduct of the parties, on the administration of justice as a whole. With this in mind it is important that the courts do not appear to condone defaults where parties do not comply with time limits.

Mrs. Taylor-Wright for the respondent rightly argued that there must be some finality to the litigation as a matter of public policy. With this I agree. It is trite to say that a party must litigate all causes of action arising from the same event or are closely associated to that event in one proceeding: see ***Henderson vs. Henderson*** **[1843-60] All ER Rep 378.** Sir James Wigram V C in giving the judgment of the court said at pages 381-382:

'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication

by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

However, this rule is not cast in stone as in the recent House of Lords decision in ***Johnson vs. Gore Wood & Co*** **[2001] 1 All ER 481** the House in assessing the decision in ***Henderson vs. Henderson*** *(supra)* held that

"although the bringing of a claim or the raising of a defence in later proceedings might, without more, amount to abuse if the court was satisfied that the claim or defence should have been raised in earlier proceedings, it was wrong to hold that a matter should have been raised in such proceedings merely because it could have been. A conclusion to the contrary would involve the adoption of too dogmatic an approach to what should be a broad, merits based judgment which took account of the public and private interests involved and the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. It was not possible to formulate any hard and fast rule to determine whether, on given facts, abuse was to be found or not. Thus, while lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, it was not necessarily irrelevant, particularly if it appeared that the lack of funds had been caused by the party against whom it was sought to claim. While the result might often be the same, it was preferable to ask whether in all the circumstances a party's conduct was an abuse than to ask whether the conduct was an abuse and then, if it was, to ask whether the abuse was excused or justified by special circumstances..."

In the present case, though, it cannot be said that the proceedings relating to the Vendor and Purchaser Summons was at an end as no judgment was delivered or order made. Accordingly, this principle has no application to this case.

A good analogy to this case can be found in cases where an application to amend pleadings is made prior to the making of a final order. This is what occurred in ***Charlesworth vs. Relay Road Limited*** **[1999] 4 All ER 397**, a post-CPR decision. In that case judgment was given for the claimant for a part of his claim but the judge adjourned to consider the terms of the order to be made when the applicant applied to amend the pleadings and to adduce new evidence in support of the amended pleadings. The application was considered by the judge bearing in mind the overriding objectives in the new CPR 1.1 in England which is similar to our CPR 2002 r.1.1. The following extract is taken from the head note:

> *"The power of a judge to review his own judgment before the drawing up of the order includes a discretion to permit the amendment of pleadings, even if that involves the putting forward of a new argument or the adducing of further evidence. That discretion must be exercised in a way best designed to achieve justice, and the general rules relating to amendment apply. Thus while it is desirable to permit litigants to take any reasonably arguable point, it should not be assumed that the court will accede to an application for a post-judgment amendment merely because the other side can, in financial terms, be compensated in costs. Similarly, as with any other application for permission to amend, consideration must be given to the anxieties and legitimate expectations of the other party, the efficient conduct of litigation and the inconvenience caused to other litigants...Furthermore, although the court should be astute to discourage applications in which parties seek to put in late evidence, cases where new evidence is found between the giving of judgment and the drawing up of the order will be comparatively"*

Neuburger J. at first instance had this to say at page 401:

> *"As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a*

late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted..."

In a pre-CPR decision, ***Gale v Superdrug Stores plc*** **[1996] 3 All ER 468** at 477-478, Millett L.J shared the same sentiment:

'The administration of justice is a human activity and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right, even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and nonjoinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice"

On the other hand, where an application to amend pleadings or to introduce new evidence succeeds, it can be unjust where it; interferes with the legitimate expectations of the parties; the efficient conduct of the case in question; prejudiced other litigants; and interfered with the administration of justice and the interests of other litigants whose cases are waiting to be heard. This view was taken in the case of ***Worldwide Corp. Ltd v GPT Ltd*** **[1998] All ER (D) 667** where Waller LJ said:

'We share Millett LJ's concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-à-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice for the sake of doing justice both to his opponent and to other litigants...Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie suggested, applies in the instant case, is that without amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last

minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it.'"

As the court has not come to a judgment in this matter; the proceedings are not at an end; and for that reason, this court has discretion whether to allow the applicants to put in their evidence, provided that it can be done without injustice to the respondent. Bearing in mind the overriding objectives in Part I of the CPR 2002, of enabling cases to be dealt with justly; and, balancing the interest of the litigants themselves and the administration of justice broadly; there cannot be any doubt that it is in the interest of justice, to allow the applicants to present their response to the respondent, and make submissions prior to the judgment of the court. In my judgment, it is the only path by which the true issue between the parties can be decided. This of course, with the requisite reply by the respondent.

Consequently, subject to the payment of cost, the court orders that the applicants are allowed to put in their evidence. However, in the interest of saving time and expense, all further submissions are to be in writing. The applicants are to make their submissions within two days of this order, and the respondent to reply within two days of receiving the applicants' submissions.

I must confess that I have reached this conclusion with a considerable lack of enthusiasm - given the history of the matter - but in my view, it gives effect to the correct principle, and ensures that a miscarriage of justice is avoided. From the outset the court accepted that the applicants' cavalier attitude to their previous attorney's instructions, and flagrant disregard for the trial date given by the court, were the cause of these proceedings. The court concluded that the applicants conduct amounted to unreasonable and prejudicial conduct deserving

of an extreme sanction. For that reason, this order is made on the condition that the applicants pay to the respondent the cost of, and caused by this application - which I summarily assess in accordance with r. 65.9, at $40,000.00. Unless the sum assessed as cost ($40,000.00) is paid within 10 days of the date of this order, the application would be dismissed.