

In September 1997 he was granted bail and released from custody pending his appeal from the Resident Magistrate's decision. His appeal against his conviction was allowed and he was so notified on July 22, 2002. He subsequently instructed his attorney to proceed with the matter.

The matter remained dormant until December 8, 2003 when an application was made by his attorney to enlarge the time for filing and serving particulars of claim.

Notice of hearing of the application was served on the defendant on May 10, 2004.

On June 8, 2004, the application was heard and the claimant was ordered to file and serve the Particulars of Claim within seven days of the Order. The defendant was ordered to file and serve his defence to the claim within 14 days of his receipt of the Particulars of Claim. The defendant was not present at this hearing.

On June 10, 2004, the Particulars of Claim was filed and it was served on the defendant on June 11, 2004. The defendant has not filed a defence. Consequently, on March 14, 2005, an application to enter default judgment against the defendant was filed and served on the defendant on April 27, 2005. The hearing of that application was fixed for May 4, 2005 but was adjourned to October 20, 2005.

The Attorney General has strenuously resisted this application on the ground that the claimant's failure to apply for Case Management Conference (C M C) before December 31, 2000 resulted in his claim being automatically struck out. Any exparte order made subsequently was null and void.

Submissions by Miss Julie Thompson

Mrs. Julie Thompson submits that an application for C M C was not made. Rule 73.3 (4) imposes a duty on the claimant to apply for C M C before December 31, 2003.

Failure to comply with the rule results in the proceedings being automatically struck out. The court therefore had no jurisdiction to hear the claimant's application on June 8, 2004 as it was functus officio in respect of those matters. In support of her contention, she relied on the Court of Appeal decision of *Norma McNaughty v Clifton Wright and Others* SCCA No. 20/2005.

She further submits that the Civil Procedure Rules (C P R) allow a party to proceedings that have been struck out under Rule 73.3 (7) to apply to restore those proceedings on condition that the application is made by April 2004. Publication of the list of the matters struck out is not required before the application for restoration of the matter is made. She relies on *Norma McNaughty v Clifton Wright* in support of her contention.

She submits further that twenty-two months have elapsed since the matter was struck out and eighteen months have elapsed since the time allowed for restoring his proceedings.

The defendant, she argues, is entitled to believe that there is no litigation pending against him. It would be unjust and prejudicial to the defendant to hear the matter. It would serve to resuscitate proceedings against the defendant after the time for bringing an action against him had elapsed. To hear the application would have the effect of resuscitating an action against the defendant after the expiry of the limitation period and

after the expiry of the time allowed the claimant by the C P R. This, she contends would amount to an abuse of the court's process.

Submissions by Mr. Errol Gentles

Mr. Gentles, on the other hand contends that the application for C M C was not made because the Particulars of Claim and defence were not filed in the matter. He submits that Rule 27.3 (1) requires the registry to fix a C M C upon the filing of a defence to a claim other than a Fixed Date Claim. Further, he submits, up to the date of filing the application to enlarge the time to file the Particulars of Claim there was no publication of a list showing the matters that were struck out. The court therefore, operated on the basis that the matter was never struck out.

He submits that Rule 73 requires the publication of the matters struck out. He contends that judgment should be entered for the claimant because of the defendant's failure to file its defence in accordance with Rule 12.5 (c). This is a proper case for the court to grant permission under Rule 12 (3) (1). According to Mr. Gentles, the requisites for the entry of judgment under Rule 12.5 are satisfied.

The Law

On January 1, 2003, the Supreme Court of Jamaica (Judicature (Rules of Court) Act the) Civil Procedure Rules (C P R) 2002 came into operation. Cases filed prior to the coming into force of the C P R are also regulated by the C P R although they were filed outside of the period which the C P R governs and were begun under the old rules. Part 73 of the C P R contains the transitional provisions. Rule 73 (3) is the rule applicable to old proceedings i.e. those matters which were filed before the C P R came into operation.

Part 73 deals with the manner in which such matters ought to be dealt with in relation to the new rules and the extent to which they are affected by the old rules after the coming into operation of the C P R. Part 73 also deals with the manner in which they became subject to the new rules.

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 Case Management Conference to be fixed.”

One of the purposes of C M C is to enable the judge to actively manage the cases in accordance with the overriding objection. In so doing, the court fixes the time tables and controls the progress of the cases.

In the instant matter, a trial date was not fixed for a trial to take place in the first term after January 1, 2003. Indeed, only an application for leave to file Particulars of Claim out of time was made. This application was made in December 2003. A date for the hearing was obtained for June 8, 2004 which was sometime after December 31, 2003.

The instant case falls within the category of those matters which were commenced under the old regime and needed to be regulated and managed by the court. The necessary timetables were not fixed and the court needed to bring the matter under the C P R in order to manage and control its progress. The C P R placed the responsibility on claimants to apply for C M C.

Rule 73.3 (7) states:

“Where no application for a Case Management Conference to be fixed is 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.”

The instant case was therefore automatically struck out as there was no application for C M C.

In McNaughty Smith J A said as follows at page 7:

“Failure to make such an application timeously will result in the automatic striking out of the claim.”

Mr. Gentles’ submission that the Particulars of Claim and defence were not filed is untenable in the circumstances. It is the duty of the judge at C M C to fix the timetable for the filing of the pleadings.

His submission as to the applicability of Rule 27 (3) (1) flies in the face of law as 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.”

(Emphasis mine)

Rule 73 which deals specifically with how old matters ought to be handled puts the responsibility for applying for C M C on such claimants.

The claimant has failed to apply to have the proceedings restored in accordance with Rule 73.4 (3).

Rule 73.4 (3) (4) states:

- (3) “Any party to proceedings which have been struck out under Rule 73.3 (7) may apply to restore the proceedings.
- (4) The application must be made before April 1, 2004.”

The language used in the section makes it mandatory that the application be made before April 1, 2004.

The claimant has failed to apply to have the proceedings restored. In the circumstances, the matter remains automatically struck out. Smith J A in the case of *McNaughty* said at page 10:

“In this regard Rule 73.4 (4) states specifically that the application must be made by April 1, 2004. Rule 73 in my view provides its own regime for dealing with the transition from the old to the new. It has clearly set a final cut-off time to apply for C M C.”

It therefore follows that succeeding hearings of any application must be a nullity.

The obtaining of a date to hear the application was not the fixing of the matter for trial as stipulated by the C P R. The claimant had a duty to comply with Rule 73.

Rule 73.4 (1) and (2) states as follows:

- (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.
- (2) The fact that the list under Paragraph (1) has been displayed must be advertised in newspaper of general circulation on a least three occasions not less than 2 weeks apart.”

Mr. Gentles’ submission that because there has been no publication of a list showing the matters that have been struck out the court should therefore operate on the basis that the matter was never struck out is misconceived in light of the recent Court of Appeal decision of *McNaughty*. At page 9 of that decision Smith J A said:

“... paragraphs 1 & 2 of Rule 73.4 were not intended to make an application for restoration conditional on their provisions being complied with. If this were so then Rule 73.4 would say so and certain provisions as to the consequences of the failure of the registry to comply and the procedure thereafter I am unable to conclude that these paragraphs were intended to notify the defendant of the striking out of the claim.”

Accordingly, matter struck out pursuant to of Rule 73.3 (7) of the Civil Procedure Rules 2002.

Leave to appeal granted.

