

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. CL2002/Mc190

BETWEEN	NORMA McNAUGHTY	CLAIMANT
AND	CLIFTON WRIGHT	1 <sup>ST</sup> DEFENDANT
AND	WARDER GORDON	2 <sup>ND</sup> DEFENDANT
AND	WARDER V.H. HALL	3 <sup>RD</sup> DEFENDANT
AND	SUPERINTENDENT R.G. WILLIAMS	4 <sup>TH</sup> DEFENDANT
AND	COLONEL JOHN PRESCOD	5 <sup>TH</sup> DEFENDANT
AND	THE ATTORNEY GENERAL	6 <sup>TH</sup> DEFENDANT

Rudolph Smellie, instructed by Daly Thwaites & Company for the Claimant.

Ms. Annaliesa Lindsay instructed by Director of State Proceedings for 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Defendants.

**Heard: 21<sup>st</sup> January and 11<sup>th</sup> February 2005**

Campbell, J.

Clifton Wright and Norma McNaughty were engaged in a common law union. Ms. McNaughty alleges that, on the 20<sup>th</sup> day November 1998, Wright, who was incarcerated at the General Penitentiary, was escorted by a warder, Gordon, to the home of the Claimant, where he assaulted the Claimant by strangling and thumping her and then stabbing her several times in her right breast, side and back.

The Claimant filed a Writ of Summons and Statement of Claim on the

28<sup>th</sup> October 2002. These were served on the Attorney General on 14<sup>th</sup> February 2003. On 14<sup>th</sup> April 2003 the Claimant's Attorney wrote to the Registrar of the Supreme Court applying for the matter to be fixed for a case management conference.

The Civil Procedure Rules 2002 came into effect on the 1<sup>st</sup> January 2003. Those Rules provide at 73.3(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 to apply for a case management conference to be fixed.”

And (7);

“Where no application for a case management conference to be fixed is made by 31<sup>st</sup> December 2003, the proceedings (including and counterclaim, third party or similar proceedings) are struck out without the need for an application by any party.”

The Rules provide for the restoration of old proceeding, for which no application have been made within the time limited by Rule 73.3(7). The relevant Rules are 73.4(3) and 73.4(4);

(3) Any party to proceedings which have been struck out under Rule 73.3(7) may apply to restore the proceedings and

(4) The application must be made by 1<sup>st</sup> April 2004.

The Defendants filed a Notice of a preliminary point dated 18<sup>th</sup> January 2005. In response, on the 28<sup>th</sup> January 2005, the Claimant filed a Notice of Application for Court Orders, in which the following orders were sought:

- (1) That the time for the application to be made for the restoration of the proceedings herein struck out under Rule 73.3(7) be extended to the 3<sup>rd</sup> day of February, 2005.
- (2) That the proceedings herein struck out under Rule 73.3 (7) be restored.

Crown Counsel, on behalf of the Defendants took a preliminary point and submitted, inter alia;

11. The Claimant did not only fail to apply to fix the hearing of the case management conference by December 31, 2003, but she also failed to apply to restore these proceedings by April 1, 2004. It is therefore submitted that these proceedings have been automatically struck out by the operation of Rule 73.3(7) of the CPR, and also that no proper application has been made to restore them by the requisite time allowed in the CPR.
12. It is therefore submitted that the Court is functus these proceedings and has no jurisdiction to conduct the set case management conference on the grounds that this application was automatically struck out as at December 31<sup>st</sup> 2003 and no application was made to restore same by April 1, 2004 as provided for in the Civil Procedure Rules 2002.

Mr. Smellie, agreed with the submissions on behalf of the Defendants that his case had been automatically struck out but submitted further that Rule 73.3(7) must be read subject to Rule 26.1(2) (c) which gives the Court a general power to enlarge the time for compliance. In his affidavit in support of his application, he admitted inadvertence on his part which stemmed from a “misreading/misunderstanding of the Rules.” He deponed that it was not reasonable for the Defendants to expect that the 1<sup>st</sup> April 2004 deadline would be strictly enforced, and that the Claimant might not properly apply out of time to have the proceedings restored. He submitted that there was no prejudice to the Defendant

Rule 26.1(2) (c) provides;

‘Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule...even if the application for an extension is made after the time for compliance.’

Part 73 deals with, proceedings that are in existence at the coming into effect of the new rules and how they become subject to those rules. These rules are transitory in

nature, and are meant to regulate proceedings in the interregnum between the Civil Procedure Code and the Civil Procedure Rules 2002. Part 73 contains detailed provisions for the conduct of old proceedings, that is proceedings commenced before the commencement date of the CPR, i.e. 1<sup>st</sup> January 2003. 73.3.4 obliges the Claimant to apply for a case management conference and 73.3.7 limits the period in which such an application may be made to the 31<sup>st</sup> December 2003 failing which the matter will be struck out. Part 73 expressly provides a restoration procedure for proceedings which were struck out. There must be a display of a list of matters so struck out in the Registry between 1<sup>st</sup> January 2004 and 31<sup>st</sup> March 2004. The list should also be advertised in the newspaper on at least three occasions two weeks apart.

The restorative procedure, allows a party struck out to apply by 1<sup>st</sup> April 2004 to have the matter restored.

Rule 73.4(6) confers discretion on the Court to restore the proceedings only if the applicant manages to satisfy the Court that he has (a) a good reason for the failure to apply pursuant to Rule 73.3(4), (b) and his case has a realistic prospect of success. (c) And the other parties would not be more prejudiced than the Claimant would be by the grant of the application than the applicant would by the refusal to grant it. I find that Rule 73.3(7) falls within the exception to Rule 26.1(2), having been provided with a restorative procedure by Rule 73.4.

Rule 73.4(B) restricts the exercise of the Courts discretion if the conditions specified are fulfilled when the applicant is within the final date for submission, i.e., 1<sup>st</sup> April 2004. Rule 26 2(c) allows an unfettered exercise of the Court's discretion, in a circumstance where the applicant fails completely to make the final deadline.

If Mr. Smellie were correct that Rule 73.3(7) must be read subject to Rule 26(1)(2), then situation would arise where the Court would have a restricted discretion to restore an applicant that was within the period limited by Rule 73.4(4), i.e., by 1<sup>st</sup> April 2004. However, the Court would have an unfiltered power to enlarge time and restore the proceedings where the applicant, as in this case, had failed to apply before April 2004. The applicant prospect of restoration would improve by being later.

Mr. Smellie argued that the Publication of the list and the advertisement would have provided him with a timely notice that the matter had been struck out. Rule 73.3.7 makes no reference to the absence of the advertisement and the list, but expressly sanctions the failure to apply for a case management conference. Rule 73.4(3) can only be defeated by an application made under Rule 73.4(3) of the C.P.R.

The cause of action in these proceedings rose in November 2004 and the time for bringing an action would have expired after the end of November. The effect of the application is to ask the Court to restore these proceedings after the expiration of the Limitation period (see **Wilbert Christopher vs. A.G. RMCA** 26/2001, 9<sup>th</sup> November 2001 (unreported) and after the time allowed her to do so by the CPR.

The preliminary objection of the Defendants is upheld. The Claimant's Notice of Application for the extension of time for application to be made for restoration of proceedings and for restoration of those proceedings be dismissed.

Costs to the Defendants to be agreed or taxed.