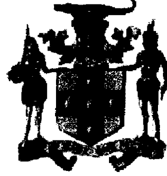

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. N198 OF 1999

IN CHAMBERS

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**CLAIMANT**
AND	**DEXTER CHIN**	**1ST DEFENDANT**
AND	**MONEY TRADERS & INVESTMENTS LIMITED**	**2ND DEFENDANT**
AND	**CONRAD GRAHAM**	**3RD DEFENDANT**
AND	**EWART GILZENE**	**4TH DEFENDANT**
AND	**SHARON GILZENE**	**5TH DEFENDANT**

Miss Hilary Phillips Q.C. and Mrs. Denise Kitson for the Claimant.

Mrs. Georgia Gibson-Henlin and Miss Tavia Dunn for the 1st, 4th and 5th Defendants.

HEARD: April 12, 20, 2005 and May 13, 2005

CORAM: WOLFE, C.J.

1. Section 73.3(4) of the Civil Procedure Rules 2002 which came into effect on January 1, 2003 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."

Section 73.3 (7) states:

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

2. The claim and counterclaim herein were struck out pursuant to the aforementioned Rules.

3. The claimant now seeks, pursuant to Rule 73.4(3) to have the proceedings restored.

Rule 73.4 (3):

> "Any party to the proceedings which have been struck out under rule 73.3 (7) may apply to restore the proceedings".

4. Applications to restore proceedings must be made before 1st April 2004. Notice must be given to all parties and must be supported by evidence of affidavit.

5. There is no issue joined in this matter as to compliance with the rules.

Rule 73.4 (6) states:

> "The court may restore the proceedings only if –
>
> (a) good reason is given for failing to apply for a case management conference under rule 73.3 (4);
>
> (b) the applicant has a realistic prospect of success in the proceedings; and
>
> (c) the other parties to the proceedings would not be more prejudiced by granting the application than the applicant by refusing it."

6. Having adverted to the legal framework governing an application of this kind, it is necessary to set out the background to the claim.

7. The claimant is a Commercial Bank incorporated under the laws of Jamaica. The first defendant is a businessman. The second defendant, a company incorporated under the laws of Jamaica, was a customer of the claimant and operated a foreign exchange account at the claimant's bank.

The 3rd, 4th and 5th defendants are Directors of the second defendant company and guarantors of a debt owed to the claimant by the said company.

8. In 1997 the first defendant issued a promissory note in the sum of $63,359,165.00 plus interest thereon at the rate of 75% per annum from May 6, 1997 and payable on demand to the order of the 2nd defendant.

9. The second defendant unconditionally endorsed the said promissory note to the claimant sometime in May 1997.

10. The defendants, notwithstanding demands made by the claimant, have failed to liquidate the said amount and up to the time of filing of this claim an amount of $56,271,915.00 was unpaid.

11. Judgment in Default of Appearance and Defence was entered against the second and third defendants in the sum of $351,699,467.00 inclusive of interest with costs in the sum of $24,000.00.

12. Objection to the claim being restored is being taken by the 1st, 4th and 5th defendants.

13. In seeking the order for restoration the claimant contends -

(a) That the claimant failed to apply for case management conference herein on or before 31st December 2003 as required pursuant to rule 73.3(4);

(b) The claimant has a realistic prospect of succeeding in the proceedings;

(c) The other parties to the proceedings would not be more prejudiced by the grant of the application than the applicant by refusing it.

14. All the defendants in opposing the application argue that the inordinate delay in making the application for restoration will be prejudicial to the defendants' interest.

15. The 4th and 5th defendants contend that the application to have the matter restored, in respect to them, is wholly misconceived as the matter had been previously struck out by the court due to the failure of the claimant to comply with an order of the court.

Rule 73.4 (6)

16. (a) Has the claimant applicant given a good reason for failing to apply for a case

management conference under rule 73.3(4).

The claimant relies on the affidavit of Mrs. Kitson, attorney-at-law, in support of its application. The reason proffered by Mrs. Kitson for failing to comply with rule 73.3(4) is best expressed in her own words contained in paragraph 7 of her affidavit.

I quote:

> "It is entirely due to inadvertence that this matter was not proceeded with in a timely manner as prescribed by the Civil Procedure Rules, and is in no way the result of willful default."

17. The inadvertence, as I understand it, is on the part of the claimant's attorneys-at-law and is in no way attributable to the claimant itself.

In ***Vashti Woods v H.G. Liquors Limited and Crawford Parkins***, a decision of the Jamaican Court of Appeal in 1995, Gordon J.A. said :

> "The plaintiff's attorneys-at-law have admitted that matters have advanced to this state as a result of their inadvertence yet they seek to benefit therefrom. This certainly in my view is conduct amounting to an abuse of the process of the court".

18. As a member of the court, then, I said:

> "The plaintiff cannot hide behind the ineptitude of the attorneys-at-law. The attorneys-at-law failure to act promptly cannot be a basis on which to deprive a party of his right to have the action dismissed for inordinate delay".

19. Under the provisions of the rule the question is not so much a matter of delay but whether or not a good reason has been given for failing to apply for case management.

20. A sanction has already been imposed for the delay viz the automatic striking out of the claim.

21. Appreciative of the principle that no person must be driven from the judgment seat and that every person ought to have his or her day in court the rules permit the restoration of the matter if good reason be shown.

22. What is the reason given for the failure to apply for case management in the stipulated time.

23. The second and third defendant failed to enter Appearance or to file a Defence and on March 20, 2000 entry of Judgment in Default of Appearance and Defence was filed.

24. It is in these circumstances the claimant alleges that it failed to do the things which it ought to have done.

25. Were the plaintiff able to recover from the second and third defendant it might not have pursued the first defendant or the third and fourth defendants.

26. In the circumstances of this particular case I find that the claimant has offered a good reason for failing to apply for case management.

27. What is the claimant's prospect of success if the matter is permitted to go to trial.

28. The statement of claim states:

> (b) That on 14th May 1997 the first defendant issued a promissory note payable on demand to the order of the second defendant;
>
> (b)That the second defendant unconditionally endorsed the said promissory note to the claimant on or about the 14th May 1997.

29. The first defendant in his defence has not denied the averments but in response has pleaded that the promissory note is void and unenforceable.

30. In addition thereto the first defendant avers that the promissory note has not been duly endorsed to the claimant and therefore the claimant has no right to sue thereon.

31. Having carefully examined the defence of the first defendant I am of the view that the claimant has a realistic prospect of success in the proceedings.

32. The final issue to be decided is whether or not the other parties to the proceedings would be more prejudiced than the claimant if the application to restore the claim is granted.

33. The question of prejudice relates to the availability of witnesses who can give material evidence on behalf of the parties who might be affected by the breach.

34. In ***Allen v Sir Alfred McAlpine and Sons [1968] 1 All E.R. 543*** Lord Denning M.R. said :

> "The principle on which we go is clear, when delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

In the same case Lord Diplock said :

> "Where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they can recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time however, when the interval between the events alleged and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest demands that the action should not be allowed to proceed". (Emphasis mine)

36. In the instant case the issue at hand concerns the validity of the promissory note. A document. There is no question of "memories growing dim or witnesses dying or disappearing". There is no likelihood of prejudice to either the claimant or the defendants, in my view.

37. For the reasons set out herein I would order the claim to be restored against the first defendant. It is also ordered that the first defendant's counterclaim be restored.

38. In respect of the 4th and 5th defendants. An order was made on June 28, 2001 ordering that the claim against them be dismissed if the claimant failed to deliver further and better particulars as requested.

The claimant, the defendants contend, failed to comply with the order and the matter was consequently struck out against the 4th and 5th defendants.

39. It is my considered opinion that Rule 73 has no application to the circumstances set out above.

40. However Rule 26.8 provides for relief from sanctions and the claimant claims relief from the sanctions imposed by virtue of the order made in June 2001.

Rule 26.8(1) states :

> "An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be;
>
> (a) made promptly; and
> (b) supported by evidence on affidavit".

In her affidavit filed on April 1, 2005 at paragraph 10 Mrs. Denise Kitson, attorney-at-Law for the claimant, deponed as follows:-

> "I was unaware that the matter was before the court when the order was made and the plaintiff therefore humbly seeks relief from the

> sanction imposed with regard to the Order as there was and had always been substantial compliance with the aforesaid particulars requested".

41. The records show that the summons for Further and Better Particulars was duly served on the attorneys-at-law for the claimant. See Ex. "MGGH 1".

42. The records further show that the Formal Order, indicating the order made by the Court on June 28, 2001 was duly served upon the attorneys-at-law for the claimant on October 29, 2001. See Ex. "MGGH 3".

43. Notwithstanding the denial of knowledge by Mrs. Kitson the claimant took no action to have the order set aside when served with the order of the Court on October 29, 2001.

44. I find in all the circumstances of the case that the claimant has not acted promptly in seeking relief from the sanction imposed. The application for relief from the sanction imposed is refused and the proceedings against the 4th and 5th defendants stand dismissed.

45. The Order of the Court is as follows:-

    1. The claim and the first defendant's counterclaim are hereby restored.

2. The claim against the 4th and 5th defendants stands dismissed.

3. There will be no order as to costs.

46 Numerous authorities were cited by counsel appearing in the matter. My failure to make reference to all of them must not be regarded as disrespect for the industry of counsel.