NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20/2009

APPLICATION NO. 36/09

BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag.)

BETWEEN	RAYTON MANUFACTURING LTD	1ST APPELLANT
	BROTHERS PROGRESSIVE LTD	2ND APPELLANT
	RMC COMMERCIAL EQUIPMENT LTD	3RD APPELLANT
	RAYMOND HUGH	4TH APPELLANT
	ANTONIO HUGH	5TH APPELLANT

A N D

WORKERS SAVINGS & LOAN BANK LTD	1st RESPONDENT
CORPORATE MERCHANT BANK LTD	2ND RESPONDENT
FINANCIAL SECTOR ADJUSTMENT CO. LTD	3RD RESPONDENT
REFIN TRUST LTD	4TH RESPONDENT

Mrs Sandra Minott-Phillips and Mr Gavin Goffe, instructed by Myers, Fletcher and Gordon, for the applicants/respondents

Mr Paul Beswick and Mr Christopher Dunkley, instructed by Phillipson Partners, for the respondents/appellants

14, 15 May and 30 July 2009

SMITH, J.A:

I have read in draft the judgment of Morrison JA and I agree entirely with his reasoning and conclusion. There is nothing further that I wish to add.

MORRISON, J.A:

Introduction

1. This matter comes before the court on a Notice of Application for Court Orders dated 24 February 2009 filed by the applicants/respondents for an order striking out the Notice of Appeal dated 11 February 2009 filed by the respondents/appellants. For easy reference, I will in this judgment refer to the applicants/respondents as "Workers Bank" and the respondents/appellants as "Rayton".

2. The appeal itself is from an order made by Rattray J on a case management conference on 2 February 2009 in the following terms:

> "1. The Case Management Conference of February 2, 2009 cannot proceed at this time as this matter was struck out pursuant to part 73.3 (8) as amended of the Civil Procedure Rules 2002;
>
> 2. No order as to costs."

3. The grounds of the application are as follows:

> "1. No right of appeal exists from proceedings which are non-existent because they were automatically struck out.
>
> 2. Further, or in the alternative, the order of Rattray, J. delivered on 2nd day of February, 2009 is an interlocutory one in respect of which permission to appeal is required by virtue of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act.
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> 3. The Appellants neither sought permission to appeal, nor was it granted in the Court below.

4. Further, or in the alternative, The Court of Appeal Rules section 1.11(1)(a) requires an Appellant to file a Notice of Appeal within seven (7) days of the date the decision appealed against was made.

5. The Appellants filed a Notice of Appeal on February 12, 2009, ten (10) days after the order of Rattray, J."

The background

4. The matter arises in this way. On 12 February 2002, Rayton filed a Writ of Summons and Statement of Claim against Workers Bank in the Supreme Court (Suit No. C.L. 2002/R-011). Nothing now turns on the details of the claim itself. This action was consolidated with another action involving the same defendants (Suit No. C.L. 2002/H-020). In September 2002, the proceedings having been served and no defence having been filed, Rayton by Notice of Motion dated 10 September 2002 sought leave to enter judgment in default of defence. The motion was heard by Reid J, who on 30 May 2003 made an order denying it, with costs to Rayton. On that same day, the judge also made an order that a defence which had been filed out of time by Workers Bank on 23 September 2002 should stand. Leave to appeal was however granted to Rayton.

5. Rayton filed an appeal against the orders made by Reid J (Supreme Court Civil Appeal No. 43/03) on 5 June 2003 and on 2 June 2005, Paul Harrison JA (as he then was) dismissed a preliminary objection

taken to the appeal by Workers Bank and ordered that it be placed before the court for hearing. When the appeal came on for hearing on 26 September 2005, it was withdrawn, with each party bearing its own costs and on 4 October 2005, pursuant to the order of the court, formal Notice of Withdrawal of Appeal was filed by Rayton. In an affidavit filed in this application, Mr Christopher Dunkley, counsel for Rayton, stated that the appeal was withdrawn in order "to facilitate the trial process" and that, before the appeal was actually withdrawn, Mrs Sandra Minott-Phillips, counsel for Workers Bank, had been informed that this was a step being considered by Rayton.

6. The action then shifted back to the Supreme Court and on 3 April 2007 Rayton's attorneys-at-law (in a letter copied to Workers Bank's attorneys-at-law) wrote to the Registrar as follows:

> "In keeping with the Civil Procedure Rules, we hereby request that the captioned claims be set down for Case Management Conference herein. We await the earliest available date."

7. By notice dated 26 September 2008, the Registrar advised the parties that a Case Management Conference had been scheduled for 2 February 2008. Workers Bank immediately protested, its attorneys-at-law writing to the Registrar on 3 October 2008 to make the point that the proceedings were 'old proceedings' within the meaning of the Civil Procedure Rules ("CPR") and that, no request for case management

having been made by 31 December 2003, they had been, in accordance with rule 73.3(8), "automatically struck out without the need for an application by any party". The letter referred the Registrar to the decision of Smith JA in ***Norma McNaughty v Clifton Wright et al*** (Supreme Court Civil Appeal No. 20/2005, judgment delivered 25 May 2005) and invited her to withdraw the notice of the case management conference and to confirm that the matter had been "automatically struck out as provided by law". Rayton responded immediately through their attorneys-at-law by letter dated 6 October 2008, saying that "we hold the view that the matter is properly before the court", while acknowledging nevertheless that Workers Bank was entitled to raise the point about the action having been automatically struck out at the case management conference.

8. The case management conference accordingly proceeded before Rattray J on 2 February 2009, with the result set out at paragraph 2 above. On 12 February 2009 Rayton filed an appeal from this decision on the following grounds:

> a) The Learned Judge in Chambers erred in holding that Suit No. C. L. 2002/H-020 was automatically struck out without due regard to Civil Appeal No. 43 and 44 of 2003.
>
> b) The Learned Judge in Chambers erred in failing to appreciate that part 73.3(8) *as amended* was intended to remove old matters where the pleadings were closed and Case Management was the next step. In the instant

matter, the Respondents' Defence was under challenge in the Court of Appeal and as such, Case Management could not be deemed to be the next automatic step of the parties.

c) The Learned Judge in Chambers erred in holding that notwithstanding the Appellant's Appeal against the Order of Reid, J. allowing the Respondents' Defence out of time, the Appellants were required to file for case management notwithstanding their Appeal, which application would have been no higher than ex *abundentai coutella* [sic].

d) The Learned Judge in Chambers erred in failing to appreciate that an application for case management during the life of the Appeal would have amounted to duplication of process and would have automatically have been required to be stayed pending the Appeal.

e) At no time during the case management conference before the Court of Appeal was any issue of Part 73 raised in relation to the matter before the Court and ruled upon by Mr. Justice Paul Harrison, JA. on June 2, 2005. In further confirmation, that the issue of the Defence remained open to that point and beyond the jurisdiction of Part 73, CPR, 2002.

f) The Learned Judge in Chambers erred in failing to have any or any sufficient regard to the circumstances under which the Appeal was withdrawn, as submitted by Counsel and in direct reliance of the parties' obligation to the overriding objective, withdrew the Appeal in September, 2005 for the express purpose of the matter being tried on its merits.

g) That in the circumstances aforesaid, and the Appeal being withdrawn after the cut off date of December *30,* 2003, would have placed the "closed" pleadings outside of the provisions of part 73.3(8) *as amended.*

h) That Part 73 of the Civil Procedure Rules, 2002, were intended to clear up old matters and was not intended to affect matters that were live before the Courts and was

such the Appellants were entitled to apply and did receive a case management date after it withdrew its procedural appeal in September, 2005.

i) That in all the circumstances, it would be a manifest injustice that the Appellants be debarred from proceeding to trial."

The application to strike out

9. The application raises three questions: (i) whether an appeal lies from Rattray J's order; (ii) if so, whether leave to appeal was necessary; and (iii) whether the appeal was filed in time.

10. On question (i), Mrs Minott-Phillips submitted that, the action in the Supreme Court having been struck out, which the order of Rattray J confirmed, there could be no appeal from non-existent proceedings. In this regard, she directed our attention to section 10 of the Judicature (Appellate Jurisdiction) Act ("the Act"), which gives this court jurisdiction "to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings..." and submitted that 'civil proceedings' within the meaning of the section had to be civil proceedings which were still in existence.

11. In any event, Mrs Minott-Phillips submitted (question ii), no appeal lies from any interlocutory judgment or order without the leave of either the judge below or of the Court of Appeal (section 11(1)(f) of the Act).

Rattray J's order was plainly interlocutory, with the result that, no leave having been sought or obtained in this matter, the appeal was not properly constituted and was therefore liable to be struck out (as was the result in similar circumstances in ***Leymon Strachan v the Gleaner Company Limited and Another,*** SCCA No. 54/97, judgment delivered 18 December, 1998).

12. And finally, on question (iii), Mrs Minott-Phillips submitted in the further alternative that the appeal, which could only be a procedural appeal, was filed out of time, the relevant rules requiring that such an appeal be filed within seven days of the decision appealed from (Court of Appeal Rules, rule 1.11(1)(a)). In this case, the order appealed from was made on 2 February 2009 and the appeal was filed on 12 February 2009.

13. On question (i), Mr Beswick submitted that there was a dispute between the parties as to whether the matter had been automatically struck out or not. This dispute had been resolved by the judge's order, which was therefore clearly appealable. In any event, rule 73.3(8) of the CPR could not have been intended to apply in circumstances such as these where the parties had been actively pursuing an appeal to this court at the time of the deadline for making an application for a case management conference. Indeed, an application for a case management conference in those circumstances might well have prejudiced Rayton's position on the appeal.

14. Mr Beswick pointed out that Workers Bank's attorneys had consented to and participated in the withdrawal of that appeal and were accordingly estopped from taking the position they had taken before Rattray J. Mr Beswick invoked the inherent jurisdiction of this court as a superior court of record and invited us to reconsider ***McNaughty*** in the light of the clear prejudice in this case to Rayton, whose claim would be extinguished without adjudication if rule 73.3(8) were to be interpreted in a technical, rather than a purposive manner.

15. On question (ii), Mr Beswick submitted that Rattray J's, order was not interlocutory in nature, but that, if the court were of the view that it was and that leave to appeal was accordingly required, Rayton was prepared to make the necessary application.

16. And on question (iii), Mr Beswick pointed out that the appeal, if procedural appeal it is in fact, was filed only three days late, which cannot be described as "egregious" (the word used by Smith JA in a similar context in ***Abdulla C. Marzouca Limited v Abdulla Marzouca and Charles H. Crooks***, Supreme Court Civil Appeal No. 7/07, judgment delivered 11 May 2007), thereby making this a fit case for the exercise of the court's discretion to extend the time for filing the appeal, pursuant to rule 1.7(2)(b) of the Court of Appeal Rules ("CAR").

Discussion on the application to strike out

17. I will deal with questions (i) and (iii) together, leaving question (ii) for the last.

18. On question (i) I think that Mr Beswick must be right. Workers Bank having taken the position that the action had been struck out automatically (and Rayton having indicated its intention to challenge that position), both parties quite properly submitted themselves to the jurisdiction of Rattray J to resolve this dispute. This the learned judge did by making the order on the case management conference from which Rayton now seeks to appeal. If, as Mrs Minott-Phillips contends, the fact that, according to rule 73.3(8), the action was automatically struck out since 31 December 2003 means that there are in existence no civil proceedings from which this court can entertain this appeal, then this reasoning ought to have applied a fortiori, it seems to me, to the hearing before Rattray J. In my view, in the absence of any definition of 'civil proceedings' in the Act, the phrase is sufficiently general to embrace the hearing before Rattray J, in which he was asked by both parties to determine the reach of rule 73.3(8) in the particular circumstances of this case.

19. On that basis, I would therefore answer question (i) in the affirmative by saying that Rattray J's order was appealable.

20. On question (iii), I agree with Mrs Minott-Phillips that this appeal falls within the definition of a 'procedural appeal' ("a decision...which does

not directly decide the substantive issues in a claim..." – CAR, rule 1.1(8)). However, given the fact that the appeal was filed only three days late and given the absence of any evidence of prejudice to Workers Bank as a result, I also agree with Mr Beswick that this is a proper case in which to extend the time for filing the appeal to 12 February 2009, which was the actual date of filing. This case is in fact not dissimilar to ***Marzouca***, in which Smith JA had expressed the view in relation to a delay of five days that "the breach is not an egregious one" (at page 8).

21. Which brings me then to question (ii), which is whether leave to appeal was necessary in this case. Section 11(1)(f) of the Act provides that no appeal shall lie without the leave of the court below or of this court "from any interlocutory judgment or any interlocutory order...", save in certain specified circumstances, none of which is applicable to the instant case.

22. In ***Leymon Strachan*** (supra), this court held that the effect of section 11(i)(f) is that an appeal cannot be entertained where leave is required, unless such leave has been obtained, and struck out an appeal filed in breach of the provision. The court also decided that the question whether an order was interlocutory or final for these purposes turned on whether the nature of the application before the court was such that whatever order was made would finally determine the matter, or whether one of the orders that was open to the court on the application would

allow the action to go on. In the former case, the order would be final, while in the latter the order would be interlocutory. This has been described as "the application approach" (see per Patterson JA at pages 7 to 11 and see also ***White v Brunton*** [1984] 2 All ER 606).

23. Applying that test to the instant case, I am distinctly inclined to agree with Mrs Minott-Phillips' submission that Rattray J's order was an interlocutory order, since, had he not ruled against Rayton, the result would have been that the case management conference and the action would have proceeded. However, during the course of the hearing, and perhaps sensing the direction of the wind on this point, Mr Beswick indicated that Rayton would be prepared, if necessary, to make an application for leave to appeal and on 22 May 2009, after the completion of the arguments, such an application was in fact filed in this court. In these circumstances, and given Mrs Minott-Phillips' intimation that, although she would oppose such an application for all the reasons already advanced by her, she would not wish to be heard further on this aspect of the matter, I would be prepared to regularise Rayton's position by granting leave to appeal from Rattray J's order.

The substantive appeal

24. The discussion in the foregoing paragraphs suffices to dispose of the application to strike out the appeal in Rayton's favour. However, because the matter was so fully argued on both sides during the hearing

of the application, the court decided, with the consent of the parties, to treat the hearing of the application as the hearing of the appeal and to deal with the matter accordingly. I therefore now turn to the substantive appeal itself.

25. It is not in dispute that the proceedings in the Supreme Court were 'old proceedings' for the purposes of Part 73 of the CPR or that, generally speaking, rule 73.3(4) placed a duty on a claimant in these circumstances to apply to the Registrar for a case management conference to be fixed. Neither is there any dispute that Rayton did not apply for a case management conference before 31 December 2003. The consequence of this omission is stated in rule 73.3(8) of the CPR, which is as follows:

> "Where an application for a case management conference to be fixed is made by 31st December 2003 the proceedings (including any counterclaim, third party or similar proceedings) are struck out without the need for an application by any party."

26. In ***McNaughty***, which was a procedural appeal, Smith JA held that where rule 73.3(7) (as the current rule 73.3(8) was then numbered) applied, failure to make an application for a case management conference by 31 December 2003 "will result in the automatic striking out of the claim" (page 7). The learned judge of appeal went on to hold that rule 26.1(2)(c), which empowers the court generally to extend the time for compliance with any rule, does not empower the court to extend the time within which a claimant is permitted by rule 73.4(3) to apply to

restore proceedings which have been struck out by the operation of rule 73.3(8).

27. And in the Supreme Court, in ***Dudley Bryan v Exton Wynter*** (Suit No C.L.B. 055 of 1997, judgment delivered 26 January 2006), Sykes J described 73.3(8) as "a guillotine", with the effect that a failure to apply for a case management conference within the 31 December 2003 deadline resulted in the proceedings being automatically struck out, subject only to an application to restore the proceedings under 73.4(3) (which had to be made by 1 April 2004).

28. Despite the apparently clear wording of rule 73.3(8) and these strong judicial statements of its effect, Mr Beswick contended that "the circumstances of this case were peculiar to it and arose during a change in the rules of procedure whilst being before the Court of Appeal". He directed our attention to section 103(5) of Constitution of Jamaica which provides that the Court of Appeal "shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court". As such, he submitted, this court has a wide inherent jurisdiction, which is not fettered by rule 73.3(8), and the court is accordingly not bound to apply the rule in a case such as this. Unlike ***McNaughty***, this was not a case of dilatory behaviour on the part of Rayton.

29. ***R v West Yorkshire Coroner, ex parte Smith (No 2)*** [1985] 1 All ER 100 was cited to us by Mr Beswick in support of his submission that this court enjoys a wide inherent jurisdiction such as to enable it, if necessary, to override rule 73.3(8) in the instant case. That case was, however, concerned with the power of a coroner's court, an inferior court of record, to impose a fine for contempt of court committed in the face of the court.

30. I do not think that the decision of the Court of Appeal in that case that such a power was necessary to enable the coroner "to keep order in the proceedings which he has the duty of conducting" (per Stephen Brown LJ, at page 106), can be of any assistance to Rayton in this case. The jurisdiction of this court, as Mrs Minott-Phillips submitted, derives from section 10 of the Act, which gives it jurisdiction "to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings". The CPR was brought into effect on 1 January 2003 by the Rules Committee of the Supreme Court, acting pursuant to powers conferred on it by section 4 of The Judicature (Rules of Court) Act. Since that date, the conduct of civil proceedings in the Supreme Court has been governed by those rules.

31. In these circumstances, I do not see any basis upon which this court can ignore the plain language of 73.3(8) of the CPR by reference to an undefined inherent jurisdiction that would allow the granting of relief from

the consequence of failing to apply for case management in a case such as this. While I fully accept, as Mr Beswick also submitted, that the primary objective of rule 73.3(8) was to weed out old, dead or moribund matters during the transition to the CPR, the rules themselves recognised that the "guillotine" which they established might work hardship in particular cases and thus provided a window of mitigation in an application to restore proceedings under rule 73.4(3), to be made by 1 April 2004.

32. In the instant case, I think that Rayton was under a clear duty to have made the necessary application for case management in the Supreme Court action by 31 December 2003, irrespective of the fact that on that date there was an appeal pending in this court from the order of Reid J. Such an application (which could have been made at any time during 2003) would have sufficed to preserve the status of the Supreme Court action, without impeding the progress of the appeal or prejudicing Rayton's position in any way. Even if the deadline stated in rule 73.3(8) was for some reason missed, an application to restore the proceedings ought to have been made by 1 April 2004. Neither step having been taken, Rattray J was, in my view, entirely correct in his conclusion that the case management conference scheduled for 2 February 2009 could not proceed as the matter had been automatically struck out pursuant to rule 73.3(8).

Conclusion

33. In summary, therefore, I would make the following orders:

(i) Leave to appeal granted;

(ii) time for filing the appeal extended to 12 February 2009;

(iii) appeal dismissed, with costs to Workers Bank, to be taxed if not sooner agreed.

McINTOSH J.A. (Ag)

I have also read in draft the judgment of Morrison J.A. I agree with his reasoning and conclusion. I wish to add nothing more.

SMITH, J.A.

ORDER

(i) Leave to appeal granted;

(ii) Time for filing the appeal extended to 12 February 2009;

(iii) The appeal dismissed, with costs to Workers Bank, to be taxed if not sooner agreed.