JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1998/L 068

BETWEEN	SAGICOR LIFE JAMAICA LIMITED (Previously known as Life of Jamaica Ltd.)	CLAIMANT
AND	BROADWAY IMPORT EXPORT LIMITED	1ST DEFENDANT
AND	RICHARD MORGAN	2ND DEFENDANT

Mr. Emile G.R. Leiba instructed by Myers, Fletcher & Gordon for the claimant.

Mr. Zavia T. Mayne for the first defendant.

October 1, November 18 & 24, 2009

Master Simmons (Ag.)

On the 9th June, 1998 the claimant filed a Writ of Summons claiming the sum of seven million four hundred and seventy four thousand three hundred and sixty one dollars and ninety five cents ($7,474,361.95) for outstanding rent and maintenance for premises at 218 Marcus Garvey Drive occupied by the first defendant. The second defendant was sued in his capacity as a Guarantor.

The claimant applied for summary judgment or in the alternative a partial judgment in the sum of $3,242,829.89 against both defendants. On the 21st September, 2000, W. A James, J. made an order that:-

> "There be partial judgment for the Plaintiff in the sum of $3,243,829.89 with interest at the rate contemplated by paragraph 5 of the Statement of Claim with effect from the 26th November 1996 to the date of judgment against the 2nd Defendant with costs to the Plaintiff to be agreed or taxed."

It is important to note that up to that time the 1st defendant had not entered an appearance although service of the Writ of Summons and Statement of Claim was effected by registered post on the 18th June 1998. This is evidenced by the Affidavit of Fay Smith sworn to on the 5th October 1998. It should also be noted that from as far back as the 5th October, 1998, the claimant had applied for a judgment in default of appearance against the 1st defendant. This was supported by all the documentary evidence required at that time and the rule was that a judgment is deemed to be entered on the date of filing if all documents are in order – **Workers Savings and Loan Bank Limited v. McKenzie and others (1996) 33 J.L.R., 410.** For some reason, the judgment was not perfected or even considered by the Registrar and the claimant filed another default judgment on the 6th February, 2001 for the entire amount claimed. This was followed by a requisition sent by the Deputy Registrar to the claimant's Attorneys on the

12th March 2001. Notations on the file suggest that there was some dispute as to whether the order made by W. A. James, J applied to both defendants or only to the 2nd defendant who had filed a defence in which he admitted owing $3,243,829.89. The order as corrected by the learned Judge refers to the 2nd defendant only but the judgment which was signed by the Deputy Registrar refers to both defendants.

This appears to be source of the confusion as to whether the default judgment being sought against the first defendant was being entered for the correct amount. According to a note on the file the order was corrected on the 30th July, 2001. The judgment however does not reflect this amendment. On the 26th March, 2002 the claimant filed another default judgment in respect of the 1st defendant but only in relation to the balance between the amount claimed and the partial judgment. This judgment was not perfected and the file remained dormant until the 13th March 2007 when another request for a default judgment was filed. The explanation given for this period of inactivity is that the Court's file was misplaced. There is no dispute between Counsel as to whether this was the case. A requisition was issued by the Deputy Registrar and this was followed by the filing of another request for judgment on the 21st March 2007. This judgment was finally perfected on the 30th March, 2007. This was followed by the grant of a provisional charging order in respect of

property registered at Volume 1048 Folio 73 of the Register Book of Titles in which the 1st defendant has a beneficial interest.

On the 20th May, 2009 the 1st defendant through its Attorney-at-law Mr. Z. Mayne, filed an application to set aside the default judgment entered on the 21st March, 2007 on the ground that at the time when the default judgment was entered the claim against the 1st defendant had been automatically stuck out under rule 73.3(8) of the ***Civil Procedure Rules, 2002 (CPR)***. He argued that Rule 73.3(4) imposed an obligation on the Claimant to apply for a Court Management Conference. The rule states -

> "Where in any old proceedings a trial date has not been fixed to take place within the first term place within the first term after the commencement date, it is the duty of the claimant to apply for a Court Management Conference to be fixed."

Mr. Mayne further submitted that these are 'old proceedings' as defined in the ***CPR*** and are subject to the transitional provisions contained in Part 73 of the ***CPR***. 'Old proceedings' are defined as "any proceedings commenced before the commencement date." The commencement date as stipulated in the ***CPR*** is the 1st January, 2003.

Mr. Mayne also made the point that although in this case, there were several applications for default judgment, some of which predate the 31st December, 2002, the documents were deemed not to be in the proper

order by the Registrar. This it was submitted was crucial, as the transitional provisions do not apply to cases in which a judgment had been entered. The case of ***Conrad Graham v. NCB*** SCCA No. 37 of 2009 (delivered September 25th, 2009) was cited to illustrate the point that under section 451 of the ***Judicature (Civil Procedure Code Law) (CPC)***, a default judgment takes effect from the date of filing if all of the documentation is in order.

He further submitted that because the default judgment was not entered until the 21st March 2007, part 73.3(4) of the ***CPR*** would apply. There is no dispute that the Claimant did not apply for a Case Management Conference to be scheduled.

Mr. Mayne argued that the effect of the Claimants' failure to apply for a Case Management Conference was fatal. In this regard it stated that Rule 73.3 (8) would apply and the claim would have been automatically struck out as at December 31, 2003. The rule states-

> "Where no application for a Case Management Conference to be fixed is made by 31st December 2003 the proceedings are struck out without the need for an application by any party."

In support of this position, Mr. Mayne referred to ***Burgess v. Wynter C.L. 1997/B055*** (delivered January 26, 2006) in which Rule 73.3(8) was described by Sykes J. as a "guillotine." In that case Sykes J went on to state that it did not matter where the proceedings had reached in the non-Hilary

Term group. His Lordship went on to state that "even if one has applied for judgment in default of defence, as in the instant case, and the documentation is in order you must apply for a Case Management Conference, even though one would be hard-pressed to see what possible value could flow out of such an application at that stage of the proceedings."

The case of ***Brown v. Holiday Inn Jamaica Inc.*** Claim No. C.L. 2000/B110 (delivered July 7th, 2008) was also cited as supporting the position taken by the Court in the ***Burgess*** case.

Counsel submitted that the facts in the ***Burgess*** case are similar to those in this matter. In that case there were several applications for default judgment and the Registrar rejected all except that filed on the 21st March 2007. The Court ruled that the default judgment should not have been entered as the matter had been automatically struck out. Counsel then went on to deal with the effect the automatic striking out would have on a default judgment entered after 31st December, 2003. He cited ***Cardinal Glennie v. the Attorney General*** CL 1994/G143 (delivered on the 18th November 2005) in which Sinclair-Haynes J. (Ag.) as she then was, declared that any proceedings after the matter was automatically struck out would be a nullity.

Mr. Leiba in response argued that the default judgment entered on the 21st March, 2007 was a perfection of the 2002 request for judgment as

only a minor amendment was made. He submitted that the date of the judgment in those circumstances should be the 26th March, 2002 when the request was first made. In that regard, he relied on the decision of the Court of Appeal in ***Workers Savings and Loan Bank v. McKenzie.***

He submitted that the papers filed in support of the 2002 judgment were in order and therefore the effective date of the judgment filed in 2007 should be the 26th March 2002. He also submitted that the ***CPR*** cannot operate to strike out a claim where a judgment was entered before January 1, 2003. In support of this point he referred to affidavit of by Ky - Ann Lee filed on the 13th July 2009 in which she stated that it was the understanding of the Claimant's attorneys that the partial judgment applied to both Defendants pursuant to the order of W.A. James, J on the 21st September, 2000. He also referred to the decision of the Supreme Court in ***Brown v. Holiday Inn Jamaica Inc.*** in which it was stated that a judgment of the court "...cannot be set aside inferentially, by rules of procedure." In the alternative, it was submitted that if the Court is minded to set aside the default judgment an order should be made directing that the judgment filed in 2002 be perfected.

It was also submitted that rule 73 relates to proceedings in their entirety and not a part of those proceedings. In this regard, Mr. Leiba sought to rely on the overriding objective of the ***CPR*** as stated in rule 1.1(1), namely that of 'enabling the court to deal with cases justly." The

CPR stipulates that the court is required to apply the overriding objective when it is either interpreting or exercising powers under the rules. In addition, he also argued that rule 73.3 was intended to deal with "stale" claims in which no case management conference was applied for or judgment entered. This point has been dealt with by this court in the ***Burgess*** case in which it was stated that an application for a case management conference was required in matters where no trial date had been set for the Hilary term of 2003.

With respect to the issue of delay, Mr. Leiba argued that the claimant was not at fault for the length of time taken to enter the default judgment against the 1st defendant. He highlighted the failure of the 2nd defendant to satisfy the partial judgment and the "loss" of the file in the Registry of the Supreme Court. He also submitted that if the partial judgment was only against the 2nd defendant, the request for judgment filed on the 6th February 2001 was proper and ought to have been entered by the Registrar.

The issues which arise for consideration are:-

1. whether rule 73 applies to proceedings as a whole or whether it may be applied to a part of those proceedings;
2. whether the judgment entered in 2007 was an amendment of that filed in 2002; and

3. whether the proceedings were automatically struck out under part 73.

With respect to the first issue the case of ***Graham v. National Commercial Bank Jamaica Limited*** SCCA No. 37/2009 (delivered on the 25th September 2009) is instructive. That case was concerned with the dismissal of the appellant's application to set aside a default judgment entered after the 31st December 2002. Among the issues which arose, was whether the judgment which was entered against the appellant/3rd defendant in the substantive suit amounted to a nullity as a result of no application for a case management conference being made within the December 31, 2003 deadline. The court held that the default judgment entered against the appellant was a nullity. In arriving at this finding, the court examined whether the papers filed in the application for judgment on the 20th March 2000 were in order and was of the view that the judgment could not have been properly entered as filed.

In the instant case, a partial judgment was obtained against the 2nd defendant who had filed a defence. The 1st defendant did not enter an appearance/acknowledge service of the Writ of Summons. The claimant could therefore proceed to trial against the 2nd defendant for the remainder of the claim or seek to enter a default judgment against the 1st defendant for the entire sum. It could also seek to enforce the partial judgment against the 2nd defendant. The claimant did not apply for a case

management conference to be held and did not apply for the matter to be restored under rule 73.4(3). If the reasoning in ***Graham v. National Commercial Bank Jamaica Limited*** is applied the result would be that the partial judgment would have to be treated as final against the 2nd defendant and that part of the proceedings which relate to the 1st defendant would be automatically struck out if there is no judgment against that defendant.

With respect to the second issue ***Graham v. National Commercial Bank Jamaica Limited*** is also instructive. The issue of whether or not the judgment which was perfected by the Registrar in 2007 amounted to an amendment of one which was filed on the 26th March 2002 is dependent on both the extent and the nature of the amendment. This is extremely important in that, based on the ruling of the court in ***Workers Savings and Loan Bank Limited v. McKenzie and others*** a default judgment takes effect on the date that it is filed. If the said judgment was an amendment it would pre date the ***CPR*** and be saved. In the ***Graham*** case, the court considered whether the earlier request for judgment was one which could have been properly perfected by the Registrar and stated, that the re filing of the request for judgment in response to the requisition of the Registrar was an implicit acknowledgement that the first request was not in order. The Court also found that the changes were too substantial for the 2004 judgment to be deemed to be a "mere" amendment of the judgment filed

on the 20th March 2000. In those circumstances, the court ruled that the respondent was not entitled to have judgment entered on the latter application and as such, the claim was automatically struck out by virtue of rule 73.3(8).

In the instant case, the judgment which was filed on the 6th February 2001 appears to have satisfied all of the procedural requirements. The requisition issued by the Registrar had its genesis in the confusion as to whether the partial judgment applied to both defendants or to only the 2nd defendant. The issue arises as to how this judgment is to be treated in light of the fact that the claimant was in no way responsible for this unhappy state of affairs. It must also be considered that only the second defendant took any step in the matter when he filed a defence acknowledging that he was partially liable for the debt. In such circumstances, could counsel reasonably believe that the judgment of W. A. James, J related to both defendants? It is my view that in this case where one defendant makes an admission, it could not be reasonably believed that based on that admission, judgment would be entered against both defendants based on that admission. In any event, the order was corrected by the learned Judge. The re-filing of the judgment papers 26th March, 2002 appears to be an "implicit acknowledgment" that the application filed in 2001 was not in order.

The judgment filed on the 26th March 2002 claimed the sum of four million two hundred and twenty one thousand five hundred and sixty two dollars and six cents ($4,221,562.06) plus costs of sixteen thousand dollars ($16,000.00). This represents the difference between the sum claimed and that awarded by W. A. James, J. There is no requisition on file dealing with this particular application but paragraphs 11 and 12 of the Affidavit of Ky-Ann Lee sworn to on the 3rd July 2009 were referred to by Mr. Leiba as providing an explanation as to why a new application for judgment was made on the 13th March 2007. They state as follows:-

> "The Court file was eventually located in 2004 and requests by letter were made to the registrar on behalf of the claimant for perfection of the Judgment in Default of Appearance filed February 6, 2001.....
>
> Consequent upon discussion with the Registrar, the Claimant then filed a Request for Default Judgment which was perfected for $4,221,712.06 plus interest. Exhibited in the Certificate of Exhibits are copies of the Request for Default Judgment and Judgment in Default filed March 27, 2007 and March 29, 2007 respectively..."

Mr. Leiba stated that the discussions with the Registrar concerned whether the Judgment could have been entered as filed in 2002 or with the advent of the new rules a fresh application was needed. He indicated that the Registrar had ruled that a fresh application had to be made and in accordance with that direction new papers were filed. The question arises

as to whether this amounts to an "implicit acknowledgment" that the 2002 papers were not in order? It is my view that the answer is in the affirmative, as no issue was taken with respect to the ruling of the Registrar. It must however be considered whether the claimant should suffer as a result of this "acquiescence" by its Attorneys-at-law.

In matters of this nature, the overriding objective of dealing with cases justly is of paramount importance. Can the claimant's attempt to rectify the situation in response to the Registrar's direction amount to an "implicit acknowledgement" that the judgment as filed was not in the proper order and without more, defeat his claim? Whilst it may amount to such an acknowledgment, the court as in the ***Graham*** case can examine the papers filed in the 2001 and 2002 applications in order to deal with the matter justly. In that case the court found that the judgment under consideration was not in order. In that case, although there is no definitive statement with respect to the likely outcome if the said judgment was in order, the fact that the court took the time to examine the papers suggests that a ruling may have been made in the respondent's favour.

With respect to the 2001 judgment, the sum of seven million four hundred and seventy-four thousand three hundred and sixty-one dollars and ninety-five cents ($7,474,361.95) plus costs of ($16,000.00) and interest at the rate of 12% per annum was claimed. This judgment was

supported by all of the necessary documents and could properly have been entered by the Deputy Registrar.

With respect to the 2002 judgment, the first point to be noted is that the amount claimed in the judgment is substantially the same as that claimed in the application for judgment filed on the 21st March, 2007. The later judgment differs in that it claims an additional sum of twenty-two thousand one hundred and fifty dollars ($22,150.00) which represents costs and court fees. The interest rate claimed was also changed from 12% to 6%. The statutory rate of interest on judgment debts was changed on the 22nd June, 2006 from 12% to 6% per annum by ***The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006***. The 2002 application for judgment to be entered in default of appearance was supported by an affidavit of debt and an affidavit of search as required by the ***CPC***. However, the last filing before the judgment dated the 26th March, 2002 was on the 6th February, 2001. There was therefore an intervening period in excess of twelve months. At that time, by virtue of section 682 of the ***CPC,*** a Notice of Intention to Proceed was required to be filed and served on all parties before any step was taken in the matter. The section states as follows:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to

proceed shall give a month's notice to the other party of his intention to proceed."

Whereas, the court may have been persuaded that the 2007 judgment was a "mere amendment" of that filed on the 26th March 2002, the above provision of the *CPC* was clearly not complied with. The effect of this is that the default judgment could not have been properly entered at that time.

With respect to the third issue, it is not disputed that an application for a case management conference to be scheduled had not been made. However, the judgment filed against the said 1st defendant on the 6th February, 2001 could properly have been perfected by the Registrar. The ***Workers Bank Savings & Loan Bank*** case is clear authority that a judgment is deemed entered on the date that it was filed if the supporting documents were in order. In those circumstances the Registrar had a duty to enter the judgment as filed. I have therefore accepted the submissions of counsel for the claimant that the judgment filed on the 6th February, 2001 should have been entered by the Registrar. In ***Holiday Inn Jamaica Inc. v. Brown*** SCCA No. 83 of 2008 Harris, J.A. stated that in circumstances where a default judgment has been entered, the claimant is not required by rule 73 of the ***CPR*** to apply for a case management conference.

Accordingly, it is my view that the claim against the 1st defendant has not been automatically struck out by virtue of rule 73.

It is therefore ordered as follows:-

1. The default judgment entered on March 21, 2007 against the 1st defendant is set aside;
2. The provisional charging order made on 3rd December, 2008 against premises registered at Volume 1048 Folio 73 of the Register Book of Titles is set aside;
3. Costs to the 1st defendant to be agreed or taxed;
4. Leave to appeal granted.