

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T039 OF 2002

BETWEEN DELORIS THOMPSON FIRST CLAIMANT

A N D JUSTIN THOMPSON SECOND CLAIMANT

A N D NATIONAL DEVELOPMENT
 FOUNDATION OF JAMAICA DEFENDANT

Miss Reuben for Claimants
Miss Robinson instructed by Taylor, Deacon & James
for the Defendant

Heard: June 29 and July 12, 2004

**Application to restore proceedings pursuant to Part 73.4
of the Civil Procedure Rules 2002**

MCDONALD J (Ag.)

On the 22nd April 2002, the Claimants, Mr. and Mrs. Thompson filed
a Writ of Summons and Statement of Claim, claiming the following:-

- (1) An account by the Defendant as to the sums paid on three loans.
- (2) A declaration that the interest rates charged under the said loans
were excessive and in breach of the Money Lending Act.

- (3) A declaration as to the sums outstanding, if any, or the overpayment made, if any in respect of the three loans.
- (4) A mandatory injunction requiring the Defendant to refund to the Plaintiffs and Maxine Gibbs, any overpayment on the loans.
- (5) A mandatory injunction requiring the Defendant to discharge mortgage number 856068 from the title.
- (6) Damages
- (7) Costs and Attorneys Costs.

On the 24th May 2002, Taylor, Deacon & James entered an appearance and on 2nd September 2002 filed a defence. The hearing of summons for Interlocutory Injunction set for 5th February 2002, 18th September 2002 and 6th November 2002 were all adjourned. No further step had been taken by the Claimants until the 21st April 2004 when the Notice of Application for proceedings to be restored was filed.

Miss Reuben in her submissions admitted that there has been non-compliance with Part 73.3(4), 73.3(7) and 73.4(4) of the CPR 2002.

The sections referred to read as follows:

Part 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”.
(emphasis supplied)

Part 73.3(7)

“where no 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”.

Part 73.4(3)

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

Part 73.4(4)

“The Application must be made by 1st April,2004”

The Application before the Court did not proceed on the basis of the Claimants seeking enlargement of time for the making of the application, the time limit having already expired.

In my opinion Part 26.1(2) CPR 2002 gives the Court such power of enlargement. It states that “except where these Rules provides otherwise, the Court may –

- (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed”.

In my opinion Part 73.4(6) only comes into play if the Application is made by 1st April 2004 or the court grant permission to enlarge the time in respect of an application made after the 1st April 2004.

No such Application was placed before the Court for consideration. However in the event that I am wrong on this and in deference to the arguments of counsel I will address the submissions made.

In determining an application made under Rule 73.4 the Court may restore the proceedings only if:-

Part 73.4(6)

- (a) 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.

Reasons for failing to comply

Miss Reuben's explanation as to her failure to apply for a Case Management Conference is contained in paragraph 4 and 5 of her affidavit.

Paragraph 4 reads –

That the reason why an application for a Case Management Conference was not made was that during the period June 2002 to December 2003, I was away from my office during much of each day, as I was employed to a development company in Montego Bay, which required me to spend time each day at its office., In addition whilst at my office, I had to write letters and make telephone calls on behalf of the said company”.

Paragraph 5:-

“That due to this change in my circumstances I met with the Claimants and advised them that I would have difficulty continuing this action on their behalf, and I advised them to obtain another Attorney, which they did not want to do. I therefore suggested, and it was agreed that I ask another Attorney in Montego Bay to work on the file along with myself, and I sent the file to that Attorney with such a request. A meeting was subsequently arranged, at which time the Claimants informed me that they did not want another Attorney to represent them and requested that I continue the matter in conjunction with my Town Agent Pierre Rogers, who had attended Court on the matter on two (2) occasions in 2002, and had also met with the Applicants. Attempts to arrange a meeting with all parties in the later part of 2003 and early 2004 failed, due to the fact that myself and the Claimants are in western Jamaica and Mr. Rogers is in Kingston and in Court most days”.

Miss Reuben faced with this difficulty up to December 2003 in not having the required time to deal with the matter and her clients insistence that she continue to represent them, has remained on the record and therefore

has a duty to comply with the provisions of the CPR which came into effect on 1st January 2003.

On the 31st December 2003 the matter became automatically struck out for failure to apply for a Case Management Conference.

In order to meet the 1st April 2004 deadline, the Claimants Attorney would have been obliged to write the Registrar of the Supreme Court requesting that the matter be set down for a Case Management Conference, copied to the Defendants attorney-at-law. In due course a Notice of the date appointed emanating from the Registry would have been served on the Attorneys.

This interim period between the application and notice of the date would have given the parties time to prepare for the Case Management Conference. The failure of the planned meeting in the latter part of 2003 and early 2004 does not, in my opinion advance the Claimants case. A letter to the Registrar requesting a date for Case Management Conference is what is required to have the matter set down.

Miss Reuben pointed out that there has been non-compliance by the Court in respect of Rule 73.4(1) and (2) CPR which read:-

Rule 73.4(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 at least three occasions not less than 2 weeks apart”.

Miss Reuben submitted that she is unaware of any such list displayed or of any advertisement in the newspaper.

I find that if such a list was published this would have assisted the Attorney if examination was made to identify the case, and act as a reminder, but this would not abrogate the Attorneys own duty to obey the time limits set out in the CPR in respect of her case and to act expeditiously.

I am of the view that the attorney did not exercise due diligence in complying with the rules and that the reasons proffered do not amount to a “good reason”.

Does the Applicant have a realistic prospect of success in the proceedings

Miss Reuben submitted and so stated in her affidavit that the Claimants have a realistic prospect of success in the proceedings. She referred the court to the Endorsement on the Writ of Summons and to the Statement of Claim, in particular to paragraphs 25, 26, 27 and 28.

The Defendant has filed no Affidavit in opposition or reply to the application before the court, nor has an Affidavit at least been filed seeking to reply on any previous affidavit filed.

In these circumstances the court ought properly only to refer to the defence filed and not to the affidavit of Mr. Waldon Wright filed on 23rd September 2002 in reference to an application for an Interlocutory Injunction.

In the defence, no admission has been made inter alia in respect of paragraphs 21, 24,25, 26,27 and 28 of the Statement of Claim. The defence is general and does not deal with each allegation of fact which is not admitted.

Even assuming that the Claimants have a realistic prospect of success in the proceedings, in my view for the Claimants to succeed in this Application all three limbs under Part 73.4(6) must be satisfied. Sub-paragraphs 6(a)(b) and (c) are to be read conjunctively. As stated before, the Claimants have failed to satisfy me that there was good reason for failing to apply for a Case Management Conference.

Prejudice

The Claimants state that the Defendant would not be prejudiced if the court were to restore the proceedings. However it is for the Claimants to

show that the other party would not be prejudiced. In my opinion they have failed to do so as there is no real evidence before me as to whether they would be prejudiced or not. It would have been helpful if the Defendant had filed an affidavit to assist the court in deciding on this question of prejudice.

By way of comment, I would say that the Defendant is a lending institution and ought to have its documentation preserved and secured in relation to matters which are pending before the Court.

I find that the Claimants have failed to satisfy me on this application that the proceedings should be restored.

Application dismissed, costs to the Defendant to be agreed or taxed.