

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. W 157/1995

BETWEEN	Ian Wright, Robert Axford and Michael Lackey, In their capacity as the Official Liquidators of Bank of Credit and Commerce International (Overseas) Ltd.	CLAIMANT
AND	Workers Savings and Loan Bank	DEFENDANT

Dennis Morrison, Q.C. and Jennifer Scott, instructed by Clinton Hart & Co. for Claimant.

Mrs. Sandra Minott-Phillips, Michael Pilling and Errol Campbell for Workers Savings & Loan Bank.

Heard: 3rd and 5th April 2006

Campbell, J.

Application for Case Management Orders

Claimant's Submission

(1) The Claimant's application for Case Management Orders was opposed by Counsel for the Defendants. The Claimant admits that he made no application for a Case Management Conference date to be fixed. The Defendant, however, by letter dated December 19, 2003, wrote requesting case management in the ancillary claim.

(2) Mr. Dennis Morrison, Q.C., submitted that the effect of the application made by the Defendant is to preserve the proceedings in its entirety and the rules do not contemplate a Case Management Conference in the ancillary claim only. It was further submitted that whilst Rule 73.3 (4) expressly makes it the duty of the Claimant to apply for a Case Management Conference. Rule 73.3 (4) does not by its terms prevent such an application from being made by any other party in the proceedings and a similar duty is implied on a defendant in the ancillary claim.

(3) He submitted that the words 'no application' in Rule 73.3 (4) admits to no qualification or restriction. Therefore an application must accordingly be effective to preserve the entire proceedings. A Case Management Conference by a Claimant preserves the entire proceedings including counterclaim, etc.

(4) Mr. Morison, Q.C. argued that it would be an anomalous result if it were to place the defendant in what is a better position by being able to request a Case Management Conference of the ancillary claim and thereby preserve that aspect of the proceedings. He said the case was distinguishable from **Norma McNaughty v Wright** SCCA 20/2005, where the Claimant had failed to apply and no other application was made. He further submitted that the overriding objective should guide the Court's interpretation of Rule 73.3(7). The rules treat proceedings as the entire litigation and do not seek to separate the claim.

The Ancillary Claimant's Submission in Opposition

(5) That Rule 73.3 (4) places a duty on the Claimant to apply for a Case Management Conference. The Claimant has never made an application. An ancillary claim is regarded as a separate proceeding which is severable from the main claim. Rules 18.2 (1) and 18.7 of the CPR, 2002.

The Defendant's letter requesting a CMC date stated specifically the application was for its ancillary claim. The statutory deadline of December 31, 2003 passed without any request for a Case Management Conference. This results in the automatic striking out of the Claimant's claim. No application for restoration was made before the deadline of April 1, 2004. It was submitted that the Court of Appeal in **McNaughty v Wright** SCCA 20/2005 has decided that the deadline cannot be extended.

Analysis

(6) The issue before this Court is whether the Defendant's ancillary claim has the effect of preserving the proceedings in its entirety, or is there cast on each Claimant the responsibility of preserving his specific claim.

Rule 73.3(4) cast a duty **on the Claimant** to apply for a Case Management Conference to be fixed. Rule 2.4 defines a Claimant as:

“**a person who makes a claim** and, in relation to any proceedings commenced before these Rules came into force, includes a respondent to any petition, originating summons or motion.”

The Defendant is properly a Claimant, for the purposes of Rule 73.3.4 of any counterclaim he might file, and has a duty separate and apart from the Claimant to apply for CMC date.

(7) Contrary to Mr. Morrison's submission that the Rules treat proceedings as the entire litigation and do not seek to separate the claim, Rule 18.2 provides:

An ancillary claim is to be treated as if it were a claim for the purposes of these Rules, except as provided by this Part.

Rule 18.2 has the effect of making the ancillary claim a separate claim, independent of any other claim that may be related to the proceedings. The duties cast on the ancillary Claimant would be independent of any other Claimant in the proceedings. The ancillary Claimant would therefore be able to start, stop, stay and withdraw his claim separately from any actions taken by the main Claimant in respect of his claim. Rule 18.7 recognises this and, provides for the severability of the ancillary claim from the proceeding.

Rule 18.7

The Defendant may continue a counterclaim even if-

- (a) **The Court gives judgment on the claim for the Claimant and does not dismiss the counterclaim: or**
- (b) **The claim is stayed, discontinued or dismissed.**

The severability of the claims was borne out by the Order of the learned Chief Justice in **National Commercial Bank (Jamaica) Ltd. v Dexter Chin**, CL N198/1999, delivered May 13, 2005 where at paragraph 37 the Court ordered:

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.”

If the description of proceedings urged by Mr. Morrison had been correct, the order restoring the Defendants counterclaim would have been otiose.

(8) If the duties of the ancillary Claimants and the Claimants are separate, can a failure by the Claimant in requesting a CMC date or the restoration of the matter be cured by an application for case management by the ancillary Claimants? In **Norma Mc. Naughty v Wright**, SCCA No. 20/2005, on a Procedural Appeal, concerned with the extension of time within which to apply for the restoration of proceedings which were struck out by virtue of Rule 73 of the CPR (2002), Smith, and J.A. said at page 7:

“Where in respect of any proceedings commenced before the 1st January 2003 a trial date has not been fixed to take place within the 2003 Hillary Term **the Claimant has up to the 31st December 2003 to apply for a case management conference.** Failure to make such an application timeously will result in the automatic striking out of the claim.”
(Emphasis mine)

The obligation is on the Claimant to make the application. His failure to do so will result in the automatic strike out of the claim. The claim that is struck out is the claim for which the defaulting Claimant faced to apply; it can mean no other claim.

(9) In Rule 73.3 (7) the proceedings that are struck-out, for failure to apply for a Case Management Conference, include any counterclaim, third party or similar proceedings. The word 'proceedings' in Rule 73.3 (7) is used in a different sense than the word proceedings in other sections of Part 73. For example, in Rule 73.3 (4) the draftsman intended a more restricted meaning to proceedings than in Rule 73.3 (7). Rule 73.3 (4) does not include any counterclaim third party or similar proceedings. It is restricted to proceedings in the Claimant claim only. The duty cast upon the Claimant in respect of Rule 73. 3. (4) is not to fix a case management date for any counterclaim, third party or similar proceedings. It is restricted to the proceedings in his claim.

(10) This restricted meaning of the word "proceedings" is also relevant to Rule 73.4 (3) which provides that:

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

This contemplates that any Claimants, on the counterclaim, third party or similar proceedings may apply to restore their particular proceedings. I am lead to this view because, whereas the word proceedings used in Rule 73.3(7) is in the restricted sense of the word, Rule 73.3 (7) having specifically provided that where

no applications have been made for Case Management Conference, the striking out affects any counterclaim, third party or similar proceedings. However, there is no such specific mention that all these would be restored by an application by any of the affected parties. In my opinion, it follows, therefore, that each party's application for restoration is only capable of restoring his particular proceedings. If this is correct, it supports the ancillary Claimant's submission that the ancillary Claimant's claim is treated separately by the Rules from that of the Claimant.

(11) To accept Mr. Morrison's submission that the Defendant's ancillary application preserves the proceedings for the Claimant would produce artificial and anomalous results. For example, a Claimant such as in **Norma McNaughty**, whose application to the Registrar for case management on April 14, 2004 failed to make "the final cut-off time" of April 1, 2004, could not be restored after 2004 because the Court lacked jurisdiction to enlarge time. Whereas, the instant Claimant who had been dormant and inactive and has not made any application, yet would have his claim preserved.

Similarly, an anomaly would also come about as a result of the circumvention of Rule 73.4 (6) that allows the Court to examine and restore the Claimant's applications as it did in **National Commercial Bank Jamaica Limited v Dexter Chin**. The Rule empowers the Court to restore proceedings that are struck out if there is a good reason for failing to apply, realistic prospect for success and whether

the other parties to the proceedings would not be more prejudiced by granting the application than the applicant by refusing it. National Commercial Bank had parts of its claim struck out and parts restored. No such examination would be done in the instant case, and though the instant Claimant's failure is more egregious, he would be ensured that his claim in its entirety would be restored.

(12) The Court was urged that the overriding objective should guide the Court's interpretation of Rule 73.3.7. The words of Smith, J.A. in **Norma McNaughty** is apposite:

“I am constrained to repeat what the Court of Appeal has said ad **nauseam** namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. **No Court should be astute to find excuses for such failure since obedience to the orders of the Court and compliance with the rules of the Court are the foundation for achieving the overriding objective of enabling the Court to deal with cases justly.**” (Emphasis mine)

(13) The ancillary Claimant's application did not preserve the Claimant's claim, which was automatically struck out for not having made a timeous application in accordance with Rule 73.3 (7). The case management will proceed in relation to the Defendant's ancillary claim. Costs to the Defendant for the period up to December 31, 2003 and cost of this application to be agreed or taxed.