

# **JAMAICA**

## **Supreme Court Civil Appeal No. 26/2006**

<b>BETWEEN</b>	<b>IAN WRIGHT ROBERT AXFORD MICHAEL MACKAY</b>	<b>1<sup>ST</sup> APPELLANT 2<sup>ND</sup> APPELLANT 3<sup>RD</sup> APPELLANT</b>
	<b>In their capacity as the OFFICIAL LIQUIDATORS OF THE BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD.</b>	
<b>AND</b>	<b>WOKERS SAVINGS &amp; LOAN BANK</b>	<b>RESPONDENT</b>

**June 2, 2006**

### **PROCEDURAL APPEAL**

Written submissions by Clinton Hart & Co. for appellants.

Written submissions by Myers, Fletcher & Gordon for defendant.

### **COOKE, J.A.**

1. In 1995, prior to the commencement date, for the coming into operation of the Civil Procedure Rules, 2002 (the Rules) in January 1, 2003, Suit No. C.L. 1995/W - 157 was brought by the appellants against the respondent. A defence and counterclaim was filed. The particulars of the claim, defence and counterclaim were not presented to the Court.

2. As this was an old proceeding, having been commenced before the commencement date the Transitional Provisions of the Rules were pertinent to the conduct of the appellant's case. No trial date had been fixed to take place within the first term after the commencement date. Accordingly, the claimant was compelled to have regard to Rule 73.3(4) which 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."

Then Rule 73.3(8) stipulates the consequence of the non-observance of Rule 73.3(4) (supra). It stipulates as follows:

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

This Court in *Norma McNaughty v Clifton Wright et al.* SCCA No. 20/2005, delivered on May 20, 2005 per Smith, J.A. has made it clear that there has to be strict adherence to the transitional provision which "provides its own regime" for dealing with the transition from the old to the new.

3. The appellants have not complied with the imperative duty imposed by Rule 73.3(4). However, the respondent by letter dated December 19, 2003 to the Registrar of the Supreme Court asked that:

"Pursuant to the Civil Procedure Rules we are hereby requesting a Case Management Conference on the ancillary claim pursuant to Rule 73.3(5)."

4. The requested Case Management Conference was not held until April 5, 2006. It is somewhat of a mystery why such an inordinately long time should have elapsed since the request in December 2003. Prior to this conference the respondent filed a "Notice of Preliminary Objection" dated 28<sup>th</sup> March 2006. It was in these terms:

**"TAKE NOTICE THAT** at the hearing of the Case Management Conference of the Defendant's Ancillary Claim set for April 3, 2006 at 12:00 noon, the Defendant will contend that the Claimants' claim has been automatically struck out pursuant to Rule 73.3(8) of the Civil Procedure Rules, 2002 and that the Case Management should proceed in respect of the Ancillary Claim only. In that regard the Defendant will be relying on the provisions of the Civil Procedure Rules, 2002 and on the decision of our Court of Appeal in the Procedural Appeal of **Norma McNaughty v Clifton Wright et al** decided on the 25<sup>th</sup> day of May, 2005, per Smith JA (copy attached)."

Campbell J. upheld the "Preliminary Objection" and the Case Management Conference proceeded only on the ancillary claim. Further it was ordered that there should be costs to the defendant in the sum of \$75,000.00 "up to the date of the automatic striking out of the Claimants' claim (31.12.03) and for the Preliminary Objection". It is against these orders that there is this procedural appeal.

5. The grounds of appeal are:

"The Learned Judge erred in law in:

1. Failing to recognize that Rule 73.3(8) of the CPR only operates to strike out proceedings where there has been no request at all for a Case Management Conference in those proceedings within the specified time and (sic) that it is irrelevant which party to the proceedings makes the request.
2. Treating Case Management in respect of the claimants' claim and the defendant's counterclaim as separate and discrete concepts when the CPR does not by its terms provide for this.
3. Applying Rule 73.3(8) not so as to preserve or strike out the proceeding as whole but in such a way as to strike out aspects of the proceedings while preserving the remainder of the proceedings.
4. Failing to recognize that Part 73 of the CPR addresses the transition of entire proceedings from the operation of the Judicature (Civil Procedure Code) Act to the CPR and does not contemplate the severance of the components of the proceedings."

6. This is a procedural appeal. It is being considered on paper having regard to the rival written submissions which have been submitted by the respective parties. The appellants submissions may be summarized thus:

- (i) The language of Rule 73.3(8) implies that the term proceedings used in that context was "not confined to a claimants claim but extends to all claims in a particular suit and specifically includes any counterclaim, third party or similar proceedings".

- (ii) "The CPR does not by its terms contemplate an application for a limited case management conference, that is one limited to a counterclaim (as in this case) or third party or similar proceedings and there are no provisions in the CPR that refer to case management conferences for the claim and the ancillary claim as discrete concepts."
- (iii) The request by the respondent for a case management conference to be fixed was "effective to avoid the consequence of striking out the proceedings and the application of any party including a defendant (as in this case) would be effective to preserve the entire proceedings".
- (iv) "As Rules 73.3(4) and (8) make it clear that a claimant's application for a case management conference to be fixed has the effect of preserving and bringing the entire proceedings including a counterclaim, third party or similar proceedings under the CPR, it would be an anomalous result for a defendant to be placed in a better position than a claimant in being able to request a case management conference in relation to his counterclaim only and thereby preserve only that aspect of the proceedings to the exclusion of the remainder of the proceedings. Such an interpretation of the CPR would be completely inconsistent with the overriding objective of the CPR as set out in Part 1 of the CPR of 'enabling the Court to deal with cases justly'."
- (v) "For Rule 73.3(8) to operate as the respondent's are suggesting, the drafting of the rule would have to specifically:
  - i. link the consequence of striking out or preservation of each party's claim to the failure of that party to

discharge its duty under Rule 73.3(4) or 73.3(5); and

- ii. refer specifically to the striking out of that party's claim or counterclaim (as the case may be).

It does not appear that the words actually used in the CPR are capable of bearing the meaning suggested by the respondents. "

- (vi) The concluding submission was that the request by the defendant "was sufficient to preserve the entire proceedings in the suit."

7. The respondent's submission may likewise be summarised thus:

- "(i) the appellants' did not discharge their duty under Rule 73.3(4) and therefore their claim was automatically struck out by virtue of 73.3(4) reliance was placed on the **McNaughty case** (supra);
- (ii) the respondent specifically requested a Case Management Conference on the ancillary claim;
- (iii) the amendment to the Civil Procedure Rules 2002, which introduced the duty to apply for Case Management Conference on a Defendant with an Ancillary Claim, was informed by the need to allow a Defendant to save his Ancillary Claim from being automatically struck out with the principal claim in the event that the Claimant failed to comply with his duty to apply for the Case Management Conference."

The amendment to which the respondent speaks is that of The Civil Procedure (Amendment No. 1) Rules 2003 dated February 17, 2003 (PRR Vol. CXXVI No.

10) at par 23 Rule 73.3 was amended by the addition of 73.3(5) which has been previously set out.

- (iv) "An ancillary claim is regarded as a separate proceeding which is severable from the main claim and reference was made to rules 18.2(1) and 18.7 of the CPR 2002".
- (v) "Logic and reason indicate that the introduction of Part 73.3 (5) into the Civil Procedure Rules 2002 was a 'lifesaver' for a Defendant with an Ancillary Claim given the provisions of then Part 73.3 (7) (now 73.3. (8))".

It is now 73.3 (8) because of the amendment hitherto referred to in par 7 supra.

- (vi) It was pointed out that "The respondent's letter requesting Case Management for its ancillary claim was copied to the Claimant's attorneys. In spite of the fact that the letter was confined to Case Management of the ancillary claim, the Claimants' attorneys still did not write to the Registrar requesting Case Management of their clients' claim".
- (vii) The concluding submission was that "given the automatic striking out of the Claimants'... claim Campbell J., was correct in upholding the... Preliminary Objection and ruling that the Case Management Conference" was to proceed solely on the Respondent's ancillary claim.

8. The resolution of this appeal turns on the effect of Rule 73.3 (5). The effect has to be determined within the context of the other Rules on 73.3 for ease of reference 73.3 is now reproduced.

## Old Proceedings

73.3

- (1) These Rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date.
- (2) Where any old proceeding has been adjourned part heard, the trial judge may give directions as to the future conduct of the proceedings or direct that a pre-trial review is fixed.
- (3) Where in any old proceedings an application is made to adjourn a trial date, the hearing of the application is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.
- (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.
- (5) A defendant has a duty to apply for a case management conference if he has an ancillary claim under Part 18.
- (6) When an application under paragraph (4) is received, the registry must fix a date, time and place for a case management conference under Part 27 and the claimant must give all parties as least 28 days notice of the date, time and place fixed for the case management conference.
- (7) These Rules apply to old proceedings from the date that notice of the case management conference is given.



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

It is to be noted that originally there was no Rule 73.3(5). It would appear that the amendment which brought into being Rule 73.3(5) was for benefit of defendants with ancillary claims. Hitherto if the claimant did not make an application for a case management conference by 31<sup>st</sup> December 2003 all defendant ancillary proceedings were struck out. Now it is no longer so. Now, the defendant with an ancillary claim has a like duty, as a claimant to make an application for a case management conference by 31<sup>st</sup> December, 2003. It is to be immediately observed that Rule 73.3(5) does not specifically state that when the defendant with an ancillary claim fulfils his duty, under this Rule that it is only the ancillary claim which survives. If that was to be the effect of Rule 73.3 (5) I would expect that this Rule would make that clear.

The purpose of Rule 73.3 is to provide the transitional regime as to how to deal with old proceedings. These old proceedings would include both the claimant's claim and ancillary claims if the latter was part of the proceedings. These transitional Rules were conceived to embrace the old proceedings in their totality. Hence in 73.3 (8) if the claimant did not make an application by the requisite time ancillary claims were automatically struck out. It is my view that

a case management conference means what it says – it's a conference pertaining to the case as a whole. A claimant could not apply for a case management conference limited to its claim. Similarly it is not open to a defendant with an ancillary claim(s) to apply for a case management conference limited to its ancillary claim. Once there is an application for a case management conference from either the claimant or a defendant with an ancillary claim there must be a consideration of the whole case. I will therefore allow this appeal and grant the orders sought by the appellants. These are:

- a) "That the Judgment upholding the preliminary objection of the Defendant be set aside.
- b) A declaration that the Claimants' claim is not automatically struck out.
- c) A declaration that Case Management orders be varied so as to include the Claimants' claim.
- d) That the order for costs be varied so that costs are costs in the claim."

## **COOKE, J.A.**

### **ORDER**

- 1) The judgment upholding the Preliminary Objection of the defendant is set aside.
- 2) A declaration is hereby made that the claimants' claim is not automatically struck out.
- 3) A declaration is hereby made that Case Management orders be varied so as to include the claimants' claim.
- 4) The order for costs is varied so that costs are in the claim.