JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 37/2009

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

BETWEEN	**CONRAD GRAHAM**	**APPELLANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**RESPONDENT**

Mr Nigel Jones instructed by **Nigel Jones & Company** for the appellant

Miss Hilary Phillips, Q.C. and **Mrs Denise Kitson** instructed by **Grant Stewart Phillips and Company** for the respondent

29, 30 June, 1 and 17 July and 25 September 2009

PANTON, P:

1. I have read in draft the reasons for judgment that have been written by my learned brother, Morrison J.A. in this matter. I agree with his expressions and opinion herein, and have nothing to add.

MORRISON, J.A:

2. On 17 July 2009, the court made the following order:

> "Appeal allowed. Order of Frank Williams, J (Ag) made on February 27, 2009 set aside, on the ground that the action against the appellant had been automatically struck out on December

> 31, 2003 pursuant to Rule 73.3(8) of the Civil Procedure Rules. Costs of the appeal and in the court below to the appellant, to be agreed or taxed."

3. These are my reasons for concurring in the decision which led to that order, which was made on an appeal from the judgment and order of Frank Williams J (Ag), given on 27 February 2009. The judge dismissed the appellant's application to set aside a judgment in default entered against him by the respondent on 14 May 2004 for $351,699,467.00, inclusive of interest, plus costs in the sum of $24,000.00. The judge had also refused to grant the declaration sought by the appellant that the respondent's claim against him had been automatically struck out as a result of the respondent's failure to apply for a case management conference before 31 December 2003, and for an order restoring the claim against the appellant.

4. Permission to appeal having been refused by the judge, the appellant renewed his application for leave in this court and on 24 March 2009, Panton P granted him permission to appeal. Notice of the appeal, a procedural appeal, was duly filed on 26 March 2009 and, on 8 May 2009, the single judge of this court to whom it was referred directed, pursuant to rule 3.4(5) of the Court of Appeal Rules, that it be placed before the court itself for hearing.

5. The appeal raises yet again the question of the effect of rule 73.3 (8) of the Civil Procedure Rules 2002 ("the CPR"), which provides that, where no application for a date for a case management conference to be fixed was made by 31 December 2003, proceedings defined as 'old proceedings' would be struck out without the need for an application by any party. A brief account of the history of the litigation in the Supreme Court is necessary to an understanding of how the question arises in this case.

6. By specially endorsed Writ of Summons dated 16 September 1999 the respondent, a commercial bank, filed action against Mr Dexter Chin, Money Traders & Investments Ltd, Messrs Conrad Graham (the appellant) and Ewart Gilzene, and Mrs Sharon Gilzene, to recover the sum of $56,271,915.00. The appellant was sued as one of the guarantors of the debt of the second named defendant, Money Traders & Investments Ltd.

7. In an affidavit of service sworn to on 10 January 2000, Mr David Simmons, an employee of the firm of attorneys-at law representing the respondent in the action, swore that the appellant was duly served with the Writ on 8 October 1999. No appearance having been entered by or on behalf of the appellant, on 10 January 2000 the respondent filed a

request with the Registrar of the Supreme Court for judgment in default of appearance, in the sum claimed together with interest at the rate of 75% per annum. However, that request was deemed by the Registrar not to be in order, as it did not indicate the date from which interest was to run. On 20 March 2000, following a requisition from the Registrar, the request was re-filed in the sum of $56,271,915.00 "with interest at the rate of 75% per annum from the 14th day of May 1997 until the date of payment of Judgment". On 14 March 2001, the Registrar issued a further requisition for the respondent to provide a copy of the promissory note supporting the rate of interest claimed. This requisition was not complied with and the judgment in default was not entered before 31 December 2003.

8. As is well known, the CPR came into force on 1 January 2003. By rule 73.1(3), all proceedings commenced before that date were designated 'old proceedings' and, by rule 73.3(4), where in any such proceedings a trial date had not been fixed to take place within the first term after 1 January 2003, it was "the duty of the claimant to apply for a case management conference to be fixed". As has already been observed, rule 73.3(8) provides that where no such application was made by 31 December 2003, the proceedings "are struck out without the need for an application by any party." Rules 73.4(3) and (4) provide that any party to proceedings struck out under rule 73.3(8) may apply to restore

the proceedings, provided that such application must be made by 1 April 2004. Importantly, rule 73.4(5) provides that the application to restore proceedings "must be made on notice to all other parties and must be supported by evidence on affidavit."

9. As at 31 December 2003, no application had been made for a case management conference to be fixed pursuant to rule 73.3(4) and, by an amended notice of application for court orders filed on 1 April 2004, the respondent applied for an order restoring the claim issued on 16 September 1999. It is common ground that notice of this application was not served on the appellant.

10. On 30 April 2004, the Registrar issued yet another requisition to the respondent's attorneys-at-law, asking them to re-file the request for default judgment "pursuant to the new rules", and on 14 May 2004 the respondent complied, requesting judgment in the amount of $351,699,467.00, "with interest continuing at the rate of $722,670.12 per day, and costs in the amount of $24,000.00". The total amount of the judgment requested was as follows:

"Amount claimed	$56,271,915.00
Together with interest from May 14, 1997 to May 14, 2004 at 75% per annum	$295,427,552.00
	$351,699,467.00"

11. On that same day, 14 May 2004, the Registrar entered judgment in favour of the respondent against the appellant "in the sum of $351,699,467.00 inclusive of interest and costs in the sum of $24,000.00".

12. Nearly a year later, the respondent's application to restore the proceedings came on for hearing before Wolfe CJ. Represented at that hearing were the respondent and the first, fourth and fifth named defendants. The appellant was not present, neither was he represented. In a reserved judgment given on 13 May 2005, Wolfe CJ observed (at paragraph 11) that judgment in default had already been entered against the second and third defendants in the sums of $351,699,467.00 inclusive of interest with costs in the sum of $24,000.00. After summarising the submissions of the parties and the applicable principles, the learned Chief Justice (at paragraph 37 of his judgment) stated as follows:

> "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".

13. In the result, the order made was as follows:

> "1. The claim and the first defendant's counterclaim are hereby restored.
>
> 2. The claim against the 4th and 5th defendant stands dismissed.
>
> 3. There will be no order as to costs".

14. Another three years passed before the appellant, on his account only just having become aware of the suit against him ("I was surprised to see the judgment entered in this matter as I had not been served with any court document in the matter"), applied on 8 July 2008 to set aside the default judgment entered on 14 May 2004. The notice of application for court orders was subsequently amended (on 26 January 2009) to seek an additional order in the following terms:

> "That upon setting aside the Default Judgment entered against the 3rd Defendant, or in any event, this Honourable Court declare, that the Claim against the 3rd Defendant has been automatically struck out against the 3rd Defendant because of the Claimant's failure to apply for a Case Management Conference, and in the absence of an Order to restore the claim against the 3rd Defendant…".

15. The grounds of the application were as follows:

> "a. A default Judgment was entered irregularly at a time when the Claimant's claim against the 3rd Defendant had been automatically struck out pursuant to the Civil Procedure Rules;
>
> b. That the Claimant's claim against the 3rd Defendant was automatically struck out as against the 3rd Defendant because there was no application for a Case Management Conference and there is no order in place restoring the claim against the 3rd Defendant;
>
> c. Alternatively and in any event, the 3rd Defendant has a real prospect of successfully defending the claim;

d. The 3rd Defendant has applied to the court as soon as is reasonably practicable after finding out that Judgment has been entered; and

e. The 3rd Defendant has a good explanation for not having filed an Acknowledgment of Service/Appearance."

16. Frank Williams J (Ag) found the following:

(i) That the appellant was served on 8 October 1998 with the specially endorsed writ and that, he having thereafter failed to enter an appearance, no good reason had been put forward for this failure.

(ii) The default judgment against the appellant "took effect from the date of first filing in March 2000…" and "The subsequent filing of a new document in 2004 amounted to a 'mere' amendment".

(iii) The claim against the appellant was not struck out by the transitional provisions of the CPR.

(iv) On an interpretation of Wolfe CJ's judgment on the application to restore the proceedings, the entire claim (with the exception of that part against the 4th and 5th defendants) was restored.

(v) The appellant had neither made the application to set aside in good time nor had he provided a good explanation for not having filed an appearance/acknowledgement of service.

(vi) The appellant had no real prospect of successfully defending the claim.

17. In the result, the application was dismissed, with costs to the respondent.

The appeal

18. Dissatisfied with this result, the appellant filed four grounds of appeal as follows:

> "1. That the decision of the Learned Judge in Chambers that there was in existence a valid default judgment against the 3rd Defendant was erroneous in law.
>
> 2. That the decision of the Learned Judge in Chambers that there was an order in place restoring the claim against the 3rd defendant was erroneous in law.
>
> 3. Alternatively, that the Learned Judge in Chambers erred in accepting the evidence of David Simmons in support of the respondent's contention that the default judgment was regularly entered.
>
> 4. Further, in the alternative, that the decision of the learned judge in chambers that there was a regularly entered default judgment and that there was no basis to set aside the regularly obtained judgment, was unreasonable in light of the affidavit evidence before the Learned Judge in Chambers".

19. On ground 1, Mr Nigel Jones, who had also appeared for the appellant in the court below, submitted that the 14 May 2004 request for a default judgment was a "new request" made under the CPR. In those circumstances, the transitional provisions in the CPR were applicable to this case and, no case management conference having been applied for within the 31 December 2003 deadline, the action had been

automatically struck out before the entry of the judgment in 2004. That judgment was therefore a nullity. Mr Jones on this basis sought to distinguish ***Workers Savings & Loan Bank Ltd v McKenzie et al*** (1996) 33 JLR 410, a case on which the respondent had heavily relied in the court below, and relied on ***Cardinal Glennie v The Attorney General*** (unreported Supreme Court Claim No. 1994/G143, judgment delivered 18 November 2005, a decision of Sinclair Haynes J), ***Dudley Burgess v Exton Wynter*** (Suit No. C.L. B055 of 1997, judgment delivered 26 January 2006, a decision of Sykes J) and ***Carl Barrington Brown v Holiday Inn Jamaica Inc.*** (Claim No. C.L. 2000/B110, judgment delivered 7 July 2008, a decision of Brooks J).

20. On ground 2, Mr Jones submitted that, the appellant not having been served with notice of the application that was heard by Wolfe CJ, the order of the judge could not sensibly be read as extending to the appellant, it having been assumed at that time that a valid and effective judgment in default had already been entered against him.

21. On ground 3, Mr Jones submitted that Frank Williams J (Ag) fell into error in finding that there had been proper service of the claim against the appellant, especially in the light of the more particular requirements of service under rules 5.5(i) and 12.4(a) of the CPR. In this case, the

respondent having been invited to re-apply for default judgment under the CPR, an affidavit of service in compliance with those rules ought to have been required by the Registrar. In any event, Mr Jones submitted further, the affidavit of service filed by the process server "does not in any way conclusively establish that the [appellant] was served".

22. And finally, on ground 4, Mr Jones submitted that this was a case in which the judge in chambers ought to have exercised his discretion to set aside the judgment, on the basis that there was no unreasonable delay on the appellant's part in making the application, that the failure to file an appearance/acknowledgement of service had been satisfactorily explained and that the appellant's defence had a reasonable prospect of success.

23. Miss Hilary Phillips, Q.C., who had also appeared for the respondent in the court below, submitted that the judgment of Frank Williams J (Ag) was entirely correct and that the appeal should accordingly be dismissed. On ground 1, she submitted that the matter was covered by the decision of this court in the ***Workers Savings & Loan Bank*** case (supra), the effect of which was that the default judgment was to be regarded as having been entered when the request for it was filed in 2000. The 14 May 2004 request was to be treated, as the judge treated it, as an amendment of the

original request for judgment and not as a fresh request. Miss Phillips submitted that the default judgment filed in 2000 was in compliance with the rules then in force (the Judicature (Civil Procedure Code) Act - "the CPC") and that under those rules the respondent had been entitled to have the judgment entered at that time. The result of this, Miss Phillips submitted, is that the transitional provisions had no application to a case in which judgment had already been entered prior to the coming into force of the CPR and in this regard she relied in particular on the judgment of Brooks J in ***Brown v Holiday Inn*** (supra).

24. On ground 2, Miss Phillips drew attention to the language of Wolfe CJ's order on the application to restore the proceedings, namely that "The claim and the first defendant's counter claim are hereby restored". This, she submitted, supported the conclusion that, even if the action had been automatically struck out under the transitional provisions, the claim against the appellant had in fact been restored by that order.

25. On ground 3, Miss Phillips submitted that the evidence of service provided by the process server amply justified the judge's conclusion that the Writ of Summons had been served. Given that there were conflicting affidavits from both sides on the issue, she submitted, this was entirely a

matter for the judge to resolve and his finding on this point ought not to be disturbed.

26. And finally, on ground 4, Miss Phillips submitted that Frank Williams J (Ag) was correct in concluding that no basis had been established by the appellant for setting aside the properly entered default judgment. The appellant had failed to satisfy the requirements of rule 13.3 of the CPR, particularly on the question of whether the appellant had a real prospect of successfully defending the respondent's claim against him. Miss Phillips pointed out that the evidence clearly showed that the appellant had duly executed the guarantee, upon which the claim against him was based, and had also executed a mortgage deed in respect of property owned by him as security for the guarantee.

The Workers Savings & Loan Bank case

27. This is a case decided under the CPC, section 451 of which provided as follows:

> "Date of entry of other judgments
>
> In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter the same, and the judgment shall take effect from that date".

28. In that case, the respondents, in two separate actions, filed for judgment in default of defence on 8 October 1996 and on the following day, 9 October 1996, the appellant filed applications for leave to file defences out of time in both actions. On 18 October 1996, Smith J (as he then was) dismissed the applications, on the basis that, the request for default judgment having been filed in proper form on 8 October 1996, the respondents were entitled to have the judgments entered and that the proper course was therefore for the appellant to apply to set them aside. An appeal from this order was dismissed, Downer JA observing that "The affidavits of Search and Debt being in proper form as well as the default judgment, the learned judge's ruling was correct" (page 415). An order was accordingly made directing the Registrar of the Supreme Court "to enter the default judgment forthwith".

29. The ***Workers Savings & Loan Bank*** case is therefore clear authority for the proposition that the effect of section 451 of the CPC was that once a judgment in default was filed supported by the documentation required by section 70 of the CPC (affidavits of service, search and debt and final judgment) and that documentation was in order, the Registrar was under a duty to enter the judgment, which therefore took effect from the date of filing.

30. The resolution of the first ground of appeal turns entirely on whether this decision is applicable to the instant case. The first question that arises is therefore whether the request for default judgment filed in 2000 can be said to have been in order. Although in its written submissions the respondent submitted that the default judgment took effect from 10 January 2000, when it was first filed, it seems clear that the subsequent re-filing on 20 March 2000 in response to the Registrar's requisition with regard to the date from which interest was to run was an implicit acknowledgement by the respondent that the first request was not in fact in order.

31. The further question is therefore whether the 20 March 2000 request was itself in order. In my view, it was not, because the judgment itself was not in proper form, requesting as it did the entry of judgment with interest beyond the date of judgment ("… with interest at the rate of 75% per annum from the 14th day of May 1997 until the date of payment of the Judgment …"). Section 70 of the CPC, which governed the procedure for obtaining judgment in default of appearance in the case of liquidated demands, specifically limited the entry of final judgment to "any sum not exceeding the sum indebted on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of six per cent per annum, to the date of judgment and costs" (emphasis supplied).

32. This is in fact in keeping with the long established rule at common law that, on a claim for principal and interest, the interest merges in the judgment, with the result that after judgment the creditor's entitlement is to receive the total judgment sum, with interest thereafter at the rate applicable to judgment debts (see **In re Sneyd; Ex parte Fewings** (1883) 25 Ch. D. 338). The recent decision of the House of Lords, with which we were very helpfully provided by Miss Phillips, in ***Director General of Fair Trading v First National Bank*** (2001) UKHL 52, does confirm that lenders may avoid the rigours of the common law rule by including in their credit agreements a term enabling the charging of interest at the contract rate until payment after as well as before judgment (see per Lord Bingham, paragraphs 2-4). However, not only is there no such provision in the Promissory Note in the instant case, but it would also appear from the clear language of section 70 that on the entry of judgment under that section a plaintiff was limited to interest at the contract rate to the date of judgment.

33. I do not think, therefore, that the respondent was entitled to have judgment entered on the 20 March 2000 application. There is, of course, the additional factor that it remained at the end of the day entirely unclear whether the Registrar's further requisition that a copy of the

Promissory Note be provided for her scrutiny was ever complied with. In this regard, Mr Jones was correct to point out, I think, that the affidavit evidence put forward by the respondent was somewhat contradictory on this point. However, because it may be arguable whether section 70 of the CPC in fact permitted the Registrar to delay entering the judgment on this score, I attribute no particular significance to this in the final analysis.

34. But there is yet another (and perhaps more fundamental) obstacle facing the respondent on ground 1, it seems to me. Even if, as Miss Phillips suggested, it was open to the Registrar to have amended the 20 March 2000 judgment by deleting the offending words ("until the date of payment of the Judgment…"), the judgment she would then have entered would have had to be in terms of the 2000 request, that is, for $56,271,915.00, with interest at the rate of 75% per annum from 14 May 1997 to the date of judgment, which would then have been 20 March 2000. Instead, what actually happened was that, having updated the figures to include interest at 75% per annum to 14 May 2004, the judgment entered on that date was for an amount almost double that for which it could have been entered in 2000. So that it appears to me to be impossible to maintain, as the respondent does (and as the judge indeed held), that the judgment entered in 2004 "amounted to a 'mere' amendment" of the 20 March 2000 request for judgment. The effective

judgment upon which the respondent now relies for enforcement purposes is the substantially larger 2004 judgment.

35. For these reasons, I therefore agree with Mr Jones that the ***Workers Savings & Loan Bank*** case is clearly distinguishable from the instant case and that, as at 31 December 2003, there was no judgment in place against the appellant. And further that, no application for case management having been made by that date, the action was automatically struck out as against the appellant, who is therefore entitled to succeed in this appeal on ground 1. This conclusion makes it unnecessary to enter into the very interesting debate as to the distinction between the decision of Sykes J in ***Burgess v Wynter***, (supra), ("Rule 73.3 (8) is a guillotine…It does not matter where proceedings have reached in [old proceedings]; one must apply for a case management conference") and the decision of Brooks J in ***Brown v Holiday Inn,*** (supra,) ("A judgment (even a default judgment) of this court is something of value, it must be obeyed until it is set aside"). It is on this basis that Miss Phillips contended that, in a case where a default judgment was already in existence on 31 December 2003, the transitional provisions did not apply. It may be sufficient to observe that an appeal from Brooks J's judgment in the latter case was dismissed on 19 December 2008, this court considering that the learned judge was correct in holding that rule 73.3(8) did not apply to

cases in which a default judgment had been entered prior to 31 December 2003 (see ***Holiday Inn Jamaica Inc. v Carl Barrington Brown***, Supreme Court Civil Appeal No. 8 of 2008).

36. This brings me then to ground 2, which raises the issue whether, even if the action was struck out, it was restored by the order of Wolfe CJ made on 13 May 2005. It will be recalled that the appellant took no part in that hearing, having not been served, as he was required to be by rule 73.4(5) of the CPR. Indeed, that hearing proceeded on the assumption, shared by both counsel for the respondent and the Chief Justice, that there was in existence a valid judgment in default against the appellant.

37. While I accept that on the face of it, as Frank Williams J (Ag) observed (at paragraph 20), that "the terms of the order are indeed quite wide", it is, I think, important to determine precisely what was actually before Wolfe CJ. It was an application by the respondent to restore proceedings against the first, fourth and fifth named defendants, judgment in default of appearance having already been entered (so it was assumed) against the second and third named defendants (see paragraphs 11 and 23 of Wolfe CJ's judgment). The first, fourth and fifth named defendants all opposed the application on the ground of

inordinate delay in making it, which they said would be prejudicial to their interests (see paragraph 14).

38. However, the fourth and fifth named defendants also relied on the fact that on 28 June 2001 an order had been made that the claim against them should be dismissed if the respondent failed to deliver further and better particulars requested by them and that the respondent having failed to comply with that order, the matter had been struck out against these two defendants. Wolfe CJ held that the transitional provisions had no application to these defendants in these circumstances (paragraph 39) and went on to consider whether the appellant was nevertheless entitled to relief from sanctions pursuant to rule 26.8(1). The learned Chief Justice held that it was not so entitled, because it had not acted promptly in seeking relief from the sanction of the action having been struck out, and consequently refused the application to restore the proceedings against the fourth and the fifth named defendants (paragraph 44).

39. It is against this background that the Chief Justice said (at paragraph 37) that "…I would order the claim to be restored against the first defendant…[and that]…the first defendant's counterclaim be restored", and then, in conclusion (at paragraph 45), that "The claim and the first defendant's counterclaim are hereby restored". The application

before Wolfe CJ having been to restore the proceedings against three defendants and his having refused the application in respect of two of them, it appears to me to be an irresistible conclusion that his concluding statement, though expressed in general terms, must have been intended to refer only to the proceedings against and by the remaining defendant. Indeed, he had already said as much earlier in the judgment (at paragraph 37) when he said that "I would order the claim to be restored against the first defendant…".

40. I would therefore conclude that the appellant is also entitled to succeed on ground 2. The action having been automatically struck out on 31 December 2003 and no order having been made restoring the proceedings in respect of the appellant, the default judgment purportedly entered on 14 May 2004 is therefore, in my view, a nullity and the appellant was entitled to the order and the declaration which he had sought from Frank Williams J (Ag).

41. In supplemental submissions filed on its behalf, the respondent had submitted in the alternative that, the application to restore the proceedings having been filed in time (on 1 April 2004), "there is nothing in law which prevents the respondent from relisting the application for hearing vis a vis the appellant". This may well be so, but it is, in my view,

entirely a matter for the respondent and its legal advisors and, as it does not strictly speaking arise for decision on this appeal I propose to make no further comment on it.

42. In the light of my conclusions on grounds 1 and 2, I do not think it necessary to give any further consideration to grounds 3 and 4, both of which only arise in the context of an application to set aside the default judgment.

43. These are my reasons for concurring in the decision of the court, which was announced on 17 July 2009.

N. MCINTOSH J.A. (Ag)

44. I too agree and have nothing further to add.

PANTON P.

ORDER:

45. Appeal allowed. Order of Frank Williams, J (Ag) made on February 27, 2009 set aside. Costs of the appeal and in the court below to the appellant, to be agreed or taxed.