[2012] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121/2011

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPELLANT**
AND	**BENJAMIN LEWIN**	**2ND APPELLANT**
AND	**SHANE PAHARSINGH**	**RESPONDENT**

Written submissions filed by the Director of State Proceedings for the 1st appellant

Written submissions filed by DunnCox for the respondent

17 February 2012

PROCEDURAL APPEAL
(Considered on paper pursuant to rule 2.4 (3) of the Court of Appeal Rules)

IN CHAMBERS

PHILLIPS JA

[1] This is a procedural appeal from the judgment of F. Williams J (Ag) (as he then was) in which he refused the orders sought by the appellants (the defendants in the court below) in the amended notice of application for court orders, dated 22 February 2011. The judge made no order as to costs and refused an application for leave to

appeal from, and for a stay of execution of his judgment. The application before Williams J (Ag) had asked for: a declaration that the claim (CL1991/P-041) had been struck out since 1 January 2004, pursuant to rule 73.3(8) of the Civil Procedure Rules 2002 (CPR); an order that the assessment of damages hearing, which on 24 November 2010 had been scheduled for 7 April 2011 was null and void, and consequently, the said date should have been vacated; costs; and such other relief as the court deemed just in the circumstances. Regrettably, however, the learned judge has not provided any reasons for his decision.

[2] On 4 October 2011 a single judge of the Court of Appeal directed that the application for permission to appeal be heard by the full court. This was done, and on 4 November 2011 the court granted leave to appeal the decision of F. Williams J and ordered a stay of execution of the decision and the proceedings in the Supreme Court pending the hearing of the appeal. On 4 November 2011, notice of appeal was filed herein.

[3] This appeal concerns the interpretation and application of certain transitional provisions of the CPR. Bearing in mind that the CPR came into effect on 1 January 2003, it is unusual for the transitional provisions of the CPR to still be the subject of controversy and debate. In this case, the issue relates to whether two items of correspondence written in 2003, when read together, could amount to a request for a case management conference, thereby avoiding the draconian consequences of failing to do so, as set out in the said provisions.

[4] Rule 73.3 of the CPR states as follows:

> "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 at 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 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.

9. A striking out pursuant to rule 73.3 (8) will be without prejudice to the defendants [sic] ability to claim costs."

[5] There have been several authorities dealing with actions which commenced before the CPR came into effect (January 2003), and addressing how the transitional provisions set out in the CPR were to be applied, such as : **Norma McNaughty v Clifton Wright and Ors** SCCA No. 20/2005 delivered 25 May 2005, the initial beacon, followed by **Dudley Burgess v Exton Wynter** CL B 055/1997, delivered 26 January 2006; **Ian Wright and Others v Workers Savings & Loan Bank** SCCA No. 26/2006, delivered 2 June 2006, and **Holiday Inn Jamaica Inc. v Carl Barrington Brown** SCCA No. 83/2008, delivered 19 December 2008. The principles which can be extracted from these cases I would summarize in this way:

1. Proceedings commenced before 1 January 2003 were "old proceedings".
2. There were two groups of "old proceedings": those in which trial dates had been fixed in the Hilary term 2003, and those in which no trial dates were in existence as of January 2003.
3. The CPR did not apply to "old proceedings" in which a trial date had been fixed in the Hilary term 2003. If the trial was not heard, or was adjourned, then the matter was generally governed, thereafter, by the CPR.

4. It was the duty of the claimant to apply for a case management conference date to be fixed in "old proceedings" in which no trial date had been fixed in the Hilary term.

5. If no date for the case management conference was fixed, the claim stood automatically struck out without any application having to be made to obtain that order.

6. The defendant also had a duty to apply for a case management conference if he had an ancillary claim under Part 18. However, once there was an application for a case management conference from either a claimant or a defendant with an ancillary claim, there had to be a consideration of the whole case. Neither party could apply for the case management conference limited to his own claim.

7. Once the application for case management was received, the registrar had to fix a date, time and place for the same.

8. The claim could be revived if struck out, if an application was made to do so by 1 April 2004, which application had to be served, but the court had no discretion to enlarge that time.

9. Where a judgment existed in a claim as at 31 December 2003, rule 73 could not and did not seek to strike out the claim. The judgment remained valid until set aside.

10. Rule 16 makes provision for the case management conference after a default judgment is entered and before a hearing date for the assessment

of damages. There is no requirement to apply for a case management conference if a default judgment has been entered.

[6] The background and the chronology of events in this matter are set out below:

1. The respondent commenced the action by way of a writ of summons dated 28 March 1991 and statement of claim dated 5 June 1992 for loss and damages suffered as a result of a collision with a government-owned motor truck on 17 July 1990. The initiating documents were duly served and the first defendant (the 1st appellant) entered an appearance on 16 April 1991.

2. On 19 May 1994 a summons for leave to enter judgment was filed with supporting affidavit, and no defence having been filed, on 6 March 1995, the respondent was granted leave to enter judgment against the 1st appellant in default of defence. On 20 March 1995, the order was served on the 1st appellant.

3. On 9 March 1995, an interlocutory judgment in default of defence was filed by the respondent and letters were written to the registry of the Supreme Court subsequent thereto requesting that judgment be entered against the 1st appellant. A summons to proceed to assessment was also filed.

4. On 14 June 2000, an interlocutory judgment in default of defence and a summons to proceed to assessment of damages were filed yet again in the same terms as that previously filed in 1995.

5. On or about 4 February 2000 the attorneys-at-law for the respondent were informed that the court's registry had been unable to locate its file since around December 2001. The default judgments filed in 1995 and 2000 had not been entered.

6. On 17 and 23 January 2003 the respondent's attorneys-at-law wrote to the registrar. These letters are at the centre of this appeal, so for clarity, I have set out the letters, which are quite short, in their entirety.

Letter of 17 January 2003:

"January 17, 2003

The Registrar
Supreme Court
King Street
Kingston

Dear Madam,

Re: **Suit No. C.L. P-041 of 1991**
Shane Paharasingh v Attorney General of Jamaica and Benjamin Lewin

We refer to our letters dated 4th February 2002 and 7th March, 2002, copies of which are enclosed for ease of reference.

In order to assist with the entry of the Interlocutory Judgment in Default of Defence filed by us on behalf of the Plaintiff on 14th June, 2000 and the fixing of a date for the hearing of our Summons to Proceed to Assessment of Damages which was filed on the same date, we enclose herewith a copy of our file in relation to the captioned matter.

We trust that you will find this to be of assistance.

Yours faithfully,

DUNNCOX

Per:

STACEY ANN L. POWELL

Encls./ "

Letter of 23 December 2003:

"December 23, 2003

The Registrar
Supreme Court
King Street
Kingston

ATTENTION: MRS. LINDO

Dear Madam:

Re: **Suit No. C.L. P-041 of 1991**
Shane Paharasingh v Attorney General of Jamaica and Benjamin Lewin

> We refer to our letter dated January 17, 2003, requesting a Case Management Conference date. A copy of the said letter is enclosed for ease of reference. Please alert us as to the date appointed as soon as possible.
>
> Kindly acknowledge receipt on the copy letter attached.
>
> Yours faithfully,
> DUNNCOX
> Per:
>
> STACY ANN L POWELL"

7. A judgment in default of defence dated 22 October 2004 was re-filed in the post-CPR format and perfected on 18 June 2010. A notice of assessment of damages dated 26 August 2010 was issued by the court.

8. By way of an amended notice of application for court orders filed on 22 February 2011, and supplemental affidavit of Garcia K. Kelly in support, the appellants sought, inter alia, a declaration that the claim had been struck out since 31 December 2003, pursuant to rule 73.3(8) of the CPR. As indicated, F. Williams J refused the application, which decision is before me on this appeal.

[7] The appellants filed six grounds of appeal. However, from a perusal of the same the crucial concern relative to this appeal appears to be:

(a) Whether the letters dated 17 January 2003 and 23 December 2003 from the attorneys-at-law representing the respondent to the Registrar of the

Supreme Court, set out above, when taken together, could be construed as a request for a case management conference, given the context in which they were written, thereby complying with rule 73.3 (4) of the CPR.

There are three other sub-issues which can be formulated thus:

(i) Was the respondent required to serve or notify the 1st appellant that a request for case management had been made, and was there evidence indicating that the application was being pursued, given the lack of response from the registrar?

(ii) Was there any, or any sufficient evidence for the learned judge to rule as he did, bearing in mind the principles enunciated in **Norma McNaughty** and ought the judge to have applied the overriding objective in those circumstances?

(iii) Was the judge in error having not exercised his discretion to vacate the date for the hearing of the assessment of damages, which was asked for in the application before him?

The submissions of the appellants

[8] Counsel submitted that part 73 of the CPR, the transitional provisions, are applicable to this case. Counsel also relied on the principles enunciated in **Norma McNaughty** to say that once the proceedings were "old proceedings" and no case management conference had been obtained, the case was automatically struck out. Additionally, he relied on rule 42.6(1)(a) of the CPR which, he submitted, makes it

mandatory for the 1st appellant to be served with a copy of the perfected order which, he said, was not done in this case.

Issue (a)

[9] Counsel submitted that the words in the 2003 letters must be construed literally. The court, he said, "cannot derive intent outside of construing the words used". The registrar, he submitted, must be able to read and understand the language of the letters, and be able to derive their intent and purpose therefrom, not what the words were "allegedly intended to mean", as set out in the second affidavit of the attorney for the respondent many years later, having been alerted to an application filed on behalf of the appellants for a declaration that the matter had been struck out for want of prosecution.

[10] The letter of 17 January 2003, he asserted, made no reference to any case management conference, and the letter of 23 December 2003, incorrectly referred to it as if it did. Counsel conceded that part 73 of the CPR requires no particular format, but submitted that the language of the request should be clear so that the registrar would be certain as to what she was required to do, namely, to fix the date time and place for the case management conference. The letter of 23 December 2003, counsel argued, acknowledged that a case management conference was required, but, it was submitted, could not be construed as a request for the same. Further, there was no follow up from the attorneys requesting information on the failure of the registrar to set the date, and

the fact that the registrar did not fix a date, was consistent with her not viewing the letter as a request for one.

Other issues on appeal

[11] Counsel also submitted that as no perfected order had been served on the 1st appellant and, no correspondence had been presented to the court requesting an explanation from the registrar for the delay in failing to set the date for the case management conference, then on that basis alone, the appeal should be allowed.

[12] Counsel argued further that the learned judge erred in applying the overriding objective in the circumstances, as it was inapplicable when the provisions of part 73 were clear and embodied their own sanctions. He relied on the **Norma McNaughty** case for support that the court's case management powers and discretion, particularly under rule 26.1(2)(c), were not applicable.

[13] Counsel contended that as the perfected judgment had not been served, the date fixed for the hearing of the assessment ought to have been vacated. Further, the default judgment entered in 2004 was irregularly obtained and invalid, as the claim had already been struck out. Additionally, permitting the respondent to proceed with this matter after 15 years had elapsed since the accident, would be extremely prejudicial to the appellants. Also, as no defence had been filed, the 1st appellant would not be able to participate in the hearing of the assessment, save in a very limited way, pursuant to rule 12.13 of the CPR, which would also be very prejudicial to the 1st appellant. Counsel concluded that the appeal should be allowed with costs.

The submissions of the respondent

[14] Counsel distinguished the instant case from the **Norma McNaughty** case by indicating that that decision was based on the fact that no application had been made for a case management conference and, no application had been made to restore the case to the court's list by 1 April 2004, as required by the transitional provisions. In the instant case, it was submitted, an application had been made for a date to be fixed for the case management conference. That being so, counsel argued, the principles in the **Norma McNaughty** case were inapplicable and the court was not therefore precluded from applying the overriding objective. Counsel also submitted that rule 42.6(1)(a) of the CPR was not applicable as that rule should be read with rule 42.(5)(1), both referable to trials and hearings of applications and, in the instant case, there was no trial as the entry of the default judgment is an administerial act effected by the registrar. However, in any event, the summons for leave to enter judgment had been duly served.

Issue (a)

[15] Counsel submitted that in construing the letters the words should derive their meaning from their context and the purpose for which they were written. Counsel conceded that the letter of 17 January 2003 did not refer to a "case management conference" and that the letter of 23 December 2003 had therefore incorrectly referred to the letter of 17 January 2003 as "requesting a Case Management Conference date". Counsel contended that one must look to external circumstances for the context of the

letters, especially if there is an error in the correspondence as there was in this case. The letter of 23 December was received in the registry on 24 December 2003, and if one were to ignore the reference to the letter of 17 January 2003, then the letter, it was submitted, was clearly a request for a date for a case management conference.

[16] Counsel stated that in construing an item of correspondence, the approach was similar to construing a statutory instrument, in that one must endeavour to ascertain the mischief that the document was intended to prevent. In this case, that mischief was to prevent the case being struck out. It was submitted that on a balance of probabilities, it could be reasonably construed that that was the intent of the writer. Counsel submitted that in those circumstances, one could apply the overriding objective and, in dealing with cases justly, that interpretation ought to be accepted, bearing in mind when the letter was submitted, that is, at the end of the year (December 2003), just before the deadline for doing so, as required by the transitional provisions in the CPR. The fact that the registrar ultimately entered the judgment showed, counsel argued, that in her view, the matter had not been struck out. Additionally, there was no requirement to issue follow up letters to the registrar asking for an explanation for the delay in issuing the date for the case management conference.

Other issues on appeal

[17] Counsel reiterated that there was no requirement in the CPR to serve the perfected copy of the default judgment, but in any event the judgment had been served in August of 2010. Counsel also maintained that the learned judge had all the

affidavits and documentation before him for consideration, and had clearly found that the letter of 23 December 2003 could only be construed as indicated. At the time when the letter had been issued, the court would have been aware of the sundry letters being written to the registrar by attorneys representing hundreds of litigants, in an effort to meet the deadline as set out in the transitional provisions in the rules.

[18] Counsel submitted that if the **Norma McNaughty** case was not applicable, then the issue of whether rule 26 applied was not relevant in the circumstances of this case, and the overriding objective was not only relevant, but should have been applied as indicated.

[19] Counsel contended that once the court refused to make the declaration that the case was struck out, there was no basis on which the court could order that the date for the hearing of the assessment should be vacated. Further, if the 1st appellant was only able to participate in a limited way, on the hearing of the assessment of damages, it was due to the 1st appellant's own failure to have filed a defence. Counsel submitted that the learned judge had not erred and the appeal should be dismissed with costs.

Discussion and Analysis

[20] It is clear to me that the letters of 17 January 2003 and 23 December 2003 must be construed within their context, namely the framework of the litigation, that is what had occurred in the past, and the status of the litigation when the letters were issued.

[21] The letter of 17 January 2003, did not request a date for a case management conference, and could not in, my view, be construed as such. At the time when it was issued, the respondent had filed two interlocutory judgments in default of defence and was awaiting the signature of the registrar on the same and for the judgment to be entered in the judgment binder with a judgment binder and folio number. The entry of the registrar's signature on the judgment is not a "proceeding" (**Deighton v Cockle & Others** [1912] 1 KB 206), and therefore the summons to proceed to assessment of damages having been filed, there would have been no further proceedings required of the respondent. The letter was, therefore, being sent along with the office file in order to assist with the entry of the judgment and the fixing of a date on the summons. Both matters were long overdue. Had the registrar acted as she ought to have done, then the judgment would have been perfected, the date on the summons would have been given and the matter would have been wholly outside the provisions of the CPR. However, as she did not respond, the matter continued to lie in abeyance.

[22] The letter of 23 December 2003, however, is different. This letter refers to the letter of 17 January 2003, as one "requesting a case management conference date". Based on what I have indicated above, that was clearly in error, as the letter did not do so, and the fact that the letter of 23 December was said to enclose it, the registrar would have seen that to be the case. However, the remaining words, "Please alert us as to the date appointed, as soon as possible," would have indicated to the registrar that a date was being requested. The question one would ask is: what could the registrar have thought she was being asked to do, particularly given that the court's file, once

located, would have disclosed that the interlocutory judgments were unsigned and the summons to proceed to assessment had as yet, no date fixed for hearing, allocated by her? The writer was requesting that she be alerted to "the date appointed". The date at that time could only have been for a case management conference. The deadline in the rules for parties to request case management dates was fast approaching, and I would agree with counsel for the respondent that the registrar would have been alerted to the fact that there was an urgency for her to act bearing in mind the draconian consequences which followed the failure to comply with the transitional provisions requiring action by 31 December 2003.

[23] It was certainly her duty to act, and presuming that the matter fell under the new regime, the summons to proceed to assessment of damages would no longer have been applicable. The registrar, in my view, could not have understood the letter in any other way. The context and the time of the issuance of the letters are important, and I so construe them.

[24] I also agree with counsel for the respondent that if the reference to the earlier letter is omitted when reading the letter of 23 December, the information with regard to the "date appointed" could only refer to the date for the case management conference in all the circumstances. This is so, bearing in mind, the purpose of the transitional provisions, which was to guide the way forward in civil claims under the new regime, and not to deprive litigants of access to the courts, they having already initiated actions; thus, a purposive interpretation must, in my opinion, be utilized.

[25] It is therefore, in my view, a situation of giving effect to the overriding objective in interpreting the rules (rule 1.2 of the CPR) and not imposing part 26 on part 73, as the former must be read subject to the latter and part 26 specifically excludes the application of part 73 (**Norma McNaughty**).

[26] That would therefore dispose of what I view as the crucial concern on this appeal. The letters, particularly that of 23 December 2003, must be construed as requesting a date for a case management conference, and the respondent would have complied with rule 73.3(4) of the CPR.

[27] However, I will make a few more observations with regard to the other "sub issues" before the court below. In my view, part 73.3(4) does not require that a claimant serve on a defendant an application for a date for a case management conference. Even when the application is made in claims proceeding in the courts, pursuant to part 27, the application is made without notice. Additionally, if the respondent did not pursue the registrar for a response to the application, that by itself, could certainly not be a basis for the claim to be struck out for want of prosecution. It is the appellants' contention that they could take no steps in the claim until the judgment had been perfected and served. The respondent could not proceed in the claim without the date fixed by the registrar.

[28] Once the letter of 23 December 2003 is accepted as a request for a date for a case management conference, then the issue of the application of the overriding objective becomes live and will have to be considered when the litigation continues, and

if the 1st appellant applies to set aside the default judgment in order to participate in a trial or the assessment of damages. At that time the court would have to look at the delay experienced in this matter and the explanation therefor and make such rulings as it deems fit in all the circumstances. The issue of vacating the date fixed for the hearing of the assessment of damages is now moot, for I agree with counsel for the respondent, that once the court refused to make the declarations as prayed, there was no basis to set aside the date for the hearing of the assessment of damages, unless the 1st appellant intended or had filed an application to set aside the default judgment, and there was no evidence of that at that stage.

[29] The views I have expressed thus far are certainly sufficient to settle the questions raised on the main issue on appeal, but in my opinion, the appeal could have been dealt with on another basis, which would have arrived at the same result.

[30] In this matter, as previously stated, it is not in doubt that the proceedings were commenced prior to 1 January 2003. In fact, as indicated, the writ of summons was filed on 28 March 1991. There was also no date fixed for hearing in the matter in the first term of 2003. The proceedings would therefore have appeared prima facie to be "old proceedings" within the definition of part 73 of the CPR. However, in the second affidavit of Gillian Pottinger, one of the attorneys who had conduct of the matter on behalf of the respondent in the court below, sworn to on 23 March 2011, and which affidavit was before the learned judge, she referred to the summons for leave to enter judgment which was filed on 19 May 1994, and the order made thereon by Master M. McIntosh (as she then was) on 6 March 1995, stating that "the plaintiff

will proceed to enter Judgment against the First Defendant". Although a copy of the interlocutory judgment filed pursuant to that order impressed with the court stamp could not be located on counsel's file, the copy on the file was exhibited with correspondence to the registrar, requiring the return of the duly entered judgment and a date on the summons to proceed to assessment of damages. There was no answer forthcoming from the registry.

[31] Pursuant to the court order of Master McIntosh, on 14 June 2000, as stated in paragraph [6] herein, a further interlocutory judgment in default of defence was re-filed in similar vein to that filed previously, along with a summons to proceed to assessment of damages. These documents were exhibited to the second affidavit of Gillian Pottinger as "GP6" and "GP7". Correspondence also exhibited to the said affidavit, indicated that information was received in February 2002 from the civil registry, through a law clerk of the firm, that the court's file could not be located, and had been misplaced since December 2001. So, the said letter of 17 January 2003 was written inquiring about the entry of the judgment and the date for the hearing of the summons to proceed to assessment of damages and sending a copy of the firm's file in an effort to assist the process. Subsequently, a further request for default judgment was filed in October 2004. This judgment was signed by the deputy registrar and finally entered in Judgment Binder 749 Folio 221. Miss Pottinger deposed that the request for judgment filed in October 2004 "was simply a reproduction of the 1995 and 2000 requests as it was on the same terms and wording and did not constitute a fresh application". She also added that she had been informed by a partner at the law firm

that in the circumstances of this case, where requests for judgment had been made previously before the commencement of the CPR, "litigants were directed to re-file the request in the new form before Judgment in Default could be entered. To date, no requisition was ever made in respect of the respective requests for judgment in default filed in 1995 and 2000".

[32] The documents filed in 1995 and 2000 were entitled:

> "INTERLOCUTORY JUDGMENT IN DEFAUL
> OF DEFENCE PURSUANT TO THE ORDER OF
> THE MASTER IN CHAMBERS ON THE 6TH DAY OF MARCH 1995"

After the heading naming the court, the division and the parties, they read as follows:

> "The First Defendant having entered an Appearance but failing to file his Defence within the time ordered by the Master in Order on Summons for Leave to Enter Judgment on the 6th day of March 1995, IT IS THIS DAY ADJUDGED that the Plaintiff recovers against the First Defendant damages to be assessed and costs.
>
> DATED the day of 1995
>
> DUNN, COX, ORRETT & ASHENHEIM
>
> PER:
>
> PLAINTIFF'S ATTORNEYS-AT-LAW
>
> JUDGMENT ENTERED IN BINDER: FOLIO:"

In my view, both, of these documents were governed by the Judicature (Civil Procedure Code) Law. The relevant sections, namely 247, 451, and 579, are set out below:

> "247. If the plaintiff's claim is, as against any defendant, for unliquidated damages only, and that defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

> "451. 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."

> "579. (1) A minute of every judgment or order, whether final or interlocutory, shall be made by the Registrar at the time when the judgment is given or the order is made and shall be approved by the Court or the Judge.
>
> (2) ...
>
> (3) Every judgment or order shall after entry be forthwith filed with the proceedings.
>
> (4) A judgment or order hereby required to be drawn up and entered shall not be acted on or enforced unless and until such judgment or order has been so drawn up and entered."

[33] It is clear to me that as the 1st appellant had failed to file a defence the respondent was entitled to an interlocutory judgment in default of defence, which the court so ordered, and having filed the document set out in paragraph [32] herein, the respondent was entitled to have the interlocutory judgment entered in the judgment

binder by the registrar forthwith, with effect from the date that the application for the judgment was made, in this case either 1995 or 2000. In **Workers Savings and Loan Bank Ltd v McKenzie et al** (1996) 33 JLR 410, Downer JA in delivering the judgment of the court, stated that once the documents were in order, in that the provisions of the Judicature (Civil Procedure Code) Law relating to the entry of default judgments had been complied with, it was the administerial duty of the registrar to enter them in the decree register for their due effect. In this case, the affidavit of search would no longer have been applicable due to the order made by Master McIntosh.

[34] I have not seen anything in the bundle filed in this court to suggest that the papers which had been submitted were not in order. This was an interlocutory judgment for damages to be assessed and the judgment entered in 2004 did not contain any more information but was in the new format required by the CPR. That being so, then the dictum of Brooks J in **Carl Barrington Brown v Holiday Inn Jamaica Inc**. claim no. CL 2000/B110 (delivered 7 July 2008) is very apt (although in that case the judgment had been entered before 31 December 2003) namely that, "A judgment (even a default judgment) of this court is something of value; it must be obeyed until it is set aside." The learned judge also correctly stated that the judgment could only be set aside by judicial process. In the instant case, the judgment, though as a result of an administrative action, was also subsequent to judicial direction, as permission was required to effect the same against the Crown. Brooks J also found in **Carl Barrington Brown** that the rules of court, being rules of procedure and

subsidiary legislation could not "inferentially" set aside a judgment of the court. He said further:

> [The rules]
> "provide for the method for setting aside a judgment but cannot otherwise achieve that result. In my view, rule 73 cannot and does not, provide for the setting aside of a judgment of this court."

Brooks J's judgment was upheld on appeal in **Holiday Inn Jamaica Inc. v Carl Barrington Brown** SCCA No. 83/2008, delivered 19 December 2008 and this court went further to indicate that part 73 of the CPR does not make provision for the automatic striking out of a claim in which, as at 31 December 2003, a default judgment was in existence. In the instant case, pursuant to section 451 of the Judicature (Civil Procedure Code) Law, the interlocutory judgment having been filed, it ought to have been entered forthwith by the registrar, and therefore would have been "in existence" as at 31 December 2003.

[35] This court also held in **Holiday Inn** that pursuant to rule 2.2(4) of the CPR, in circumstances where the case was not struck out automatically as a judgment was in existence, the CPR which applied to all "old proceedings" in which no trial date had been fixed for hearing, or no applications had been filed or fixed for hearing in the Hilary term 2003 (which in my view, prima facie, could include this claim, although, the judgment had only been filed but not entered) would apply. This court stated further, that in those circumstances, part 16 of the CPR which governed assessment of damages would be applicable to matters in which interlocutory judgments had been

entered and the damages were yet to be ascertained. Part 16 of the CPR had its own regime in respect of the procedures to be followed, consequent on the entry of the judgment, and part 73 was subordinate to it. If the claimant was ready to proceed to have the damages assessed, and had so stated, then the registrar had to set a date for the hearing of the same; if the claimant was not ready to proceed, then when the time had elapsed when the claimant should be ready on his own estimation, then the date should be fixed and disclosure and inspection of documents should take place as well as the exchange of witness statements.

[36] In the instant case, there was no date fixed for trial (which would include a date for assessment) and no applications had been filed or dates fixed for the hearing of the same in the Hilary term 2003. There was no dispute on this. Indeed, the attorneys for the respondent had been asking for a date for the summons to proceed to assessment, which, as at January 2003 when the CPR came into effect, had not yet been given. However, in my view, as the interlocutory judgment had been filed, the matter could not have been automatically struck out pursuant, as indicated, to the decisions of **Holiday Inn Jamaica Inc. v Carl Barrington Brown** and **Workers Savings and Loan Bank Ltd v Mckenzie**. What ought to have occurred was that the interlocutory judgment should have been perfected, entered in the judgment binder and the respondent would then have been subject to the part 16 regime of the CPR governing the assessment of damages.

[37] It is clear to me that cases in which default judgments have been obtained do not fall under the part 73 regime of the CPR, but under part 16 for damages to be assessed.

[38] As a consequence of all of the above, the judgment entered in 2004, whether accepted as granted and/or having effect from 1995, 2000 or 2004, would in my opinion have been regularly obtained. This would be so, either pursuant to section 451 of the Judicature (Civil Procedure Code) Law, so that the matter could not be automatically struck out as a judgment would have been in existence as at 31 December 2002, or could not be automatically struck out as a case management conference had been requested as at 31 December 2003. The judgment would therefore remain effective until and unless set aside by the court.

[39] In relation to the orders requested in the notice and grounds of appeal, I make the following orders:

1. The orders made by Frank Williams J (Ag) on 9 May 2011 are affirmed.

2. The letter of 23 December 2003 can be construed as a letter requesting a date to be appointed for a case management conference.

3. The application for the declaration that the claim was automatically struck out pursuant to rule 73.3(8) of the CPR is refused.

4. The date fixed for the hearing of the assessment of damages was not null and void, and ought not to have been vacated.

5. Costs of the appeal to the respondent.

Conclusion

[40] In light of all of the above, the appeal is dismissed with costs to the respondent.