JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 101/2005

BETWEEN: DEXTER CHIN APPLICANT/1ST DEFENDANT

AND: NATIONAL COMMERCIAL BANK RESPONDENT/CLAIMANT

IN CHAMBERS

BEFORE: THE HON. MRS. JUSTICE HARRIS J.A. (Ag.)

Mrs. Georgia Gibson-Henlin and Miss Tavia Dunn instructed by Nunes Scholefield and Deleon for the applicant

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

July 26 and December 13, 2005

HARRIS, J.A. (Ag.)

This is an application for leave to file appeal out of time and for leave to appeal against an order of the Honourable Chief Justice, restoring a claim brought by the respondent.

The circumstances which gave rise to the application can be briefly outlined.

In 1999, prior to the commencement of the Civil Procedure Rules 2002 (hereinafter referred to as CPR) a claim was brought by the respondent against the applicant and four other defendants. Defence and counterclaim were filed by the applicant.

Sometime in May 1997, the applicant issued a promissory note in the sum of $63,359,165.00 which attracted interest at the rate of 75% per annum from May 6, 1997, payable on demand to the order of a company called Money Traders & Investment Ltd. The company was a customer of the respondent. On or about May 14, 1997, the promissory note was unconditionally endorsed to the respondent by the company. Conrad Graham, Ewart and Sharon Gilzene, directors of the company, guaranteed the debt. In the court below, the company, Mr. Graham, Mr. and Mrs. Gilzene together with the applicant were named defendants. Demands were made on the defendants to liquidate the indebtedness. This they failed to do. At the time of filing of the writ of summons, the sum of $56,271,915.00 remained outstanding. Judgment in default of appearance and defence, in the sum of $351,699,467.00 inclusive of interest and costs in the sum of $24,000.00, was entered in favour of the respondent against Money Traders Ltd. and Conrad Graham.

By Rule 73.3(4) of the CPR, the respondent, as claimant was obliged to apply for a date for case management conference to be fixed. This it failed to do. Under Rule 73.3(7) where no application for a date for fixture of case management conference had been made before December 31, 2003, all

proceedings were automatically struck out. In obedience to the rules, the claim and counter claim were struck out.

Rule 73(4)(4) requires an application to restore the proceedings, which have been struck out, to be made before April 1, 2004. On that date the respondent made an application for the restoration of its claim. To this, the applicant as well as two other defendants objected. The learned Chief Justice subsequently made the following order:

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

The applicant sought leave of the learned Chief Justice to appeal against his order but this was refused.

Under Rule 1.8(9) of the Court of Appeal Rules 2002, an applicant will not be granted leave to appeal unless the court is satisfied that the appeal has a real chance of success. The principal consideration for this court therefore is whether the applicant has a realistic prospect of successfully pursuing an appeal.

The following are the proposed grounds of appeal:

> "1. The learned Judge wrongly exercised his discretion when he restored the Claimant's claim.
>
> 2. The learned Judge erred as a matter of fact and/or law in failing to accept the submissions made on behalf of the 1st Defendant and the provisions of Part 73.4(6) are cumulative and

that the Respondent has failed to satisfy the Court on all three grounds.

3. The learned Judge erred and/or in law in failing to construe the test of real prospects of success in Part 73.4(6) as being the same as under Part 15 of the Civil Procedure Rules 2002.

4. The learned Judge erred in fact and/or in law in his determination that the Claimant had given good reason for its failure to apply for a Case Management Conference by December 31, 2003 as required under the Civil Procedure Rules of 2002.

5. The learned Judge erred in fact and/or in law in his determination that the Claimant had a realistic prospect of success as against a fanciful prospect of success.

6. The learned Judge erred as a matter of fact or law in finding, that no prejudice will be done to the 1st Defendant by the Claimant's failure to prosecute the matter with due diligence.

7. The learned Judge failed to give due regard to the evidence of the Claimant's previous dilatory conduct in the prosecution of the matter.

8. The learned Judge failed to give due regard to the provisions of the Bills of Exchange Act and its requirements in relation to promissory notes including the requirement for notice before action.

9. The learned Judge failed to give due regard to the authorities submitted on the question of realistic prospect of success.

10. The learned Judge erred in fact and/or in law in determining what matters are appropriate for consideration in deciding whether to restore proceedings.

> 11. The learned Judge wrongly exercised his discretion when he failed to Order costs to the 1st Defendant."

Although the applicant has filed eleven prospective grounds of Appeal they all revolve around one central issue and that is whether the learned Chief Justice had acted wrongly in allowing the respondent to proceed with the claim. The CPR came into operation on January 1, 2003. The advent of these rules has revolutionized civil procedure. The spirit and intent of the rules are anchored in its overriding objective which centres on the achievement of justice.

Rule 1.1 states:

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

In **Buguzzi v Rank Leisure PLC** [1999] 1 WLR 1926 Lord Woolf MR in reviewing the matter of the exercise of judicial discretion with reference to the new Rules, at paragraph 41 said:

> "The courts have learnt, in consequence of the periods of excessive delay which took place before April 1999, that the ability of the courts to control delay was unduly restricted by decisions as **Birkett v James** ([1978] AC 297). In more recent decisions the courts sought to introduce a degree of flexibility into the situation because otherwise the approach which was being adopted by litigants generally of disregarding time limits for taking certain action under the rules would continue."

At paragraph 42 he declared:

> "Under the CPR the position is fundamentally different. As Part 1 Rule 1.1 makes clear the CPR are

> "a new procedural code with the overriding objective of enabling the court to deal with cases justly."
>
> The problem with the position prior to the introduction of the CPR, was that often the courts had to take draconian steps such as striking out the proceedings, in order to stop a general culture of failing to prosecute proceedings expeditiously."

He went on to state at paragraph 49:

> "The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage, of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

In **Purdy v Cambran** (CAT 17 December, 1999) at paragraph 46 May L.J. dealt with the matter as follows:

> "The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decision under the former rules had constructed..."

The application of the overriding objective is governed by Rule 1.2 which states:

> "The court must seek to give effect to the overriding objective when it:-
>
> (a) exercises any discretion given to it by the Rules; or

(b) interprets any rule."

In applying the overriding objective of the CPR, a court must ensure that justice is done by taking into account the factors of the particular case before it. Each case must be considered as to whether the circumstances warrant a favourable or unfavourable order for the party making the application. In its quest for justice, the rules provide the court with wide powers in making decisions as to the order to be made in a given case after taking into account available possibilities.

In dealing with the court's powers in its implementation of the overriding objective, in **Purdy v Cambran** (supra) at paragraph 51 Lord Justice May said:

> "The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all the relevant circumstances and, in deciding what order to make, makes a broad judgment after considering all the possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim, or decline to do so. The decision depends on the justice of all the circumstances of the individual case."

Before the CPR came into operation, under the old rules, the authorities demonstrate that the courts frequently adopted a very rigid approach in relation to the termination of proceedings if a party failed to act with dispatch in having litigation concluded. This often resulted in litigants vigorously pursuing matters in order to bring them to an end "irrespective of the justice of the case." They were goaded into acting expeditiously so as to adhere to compliance with procedural rules. The new rules, offer some flexibility in the courts arriving at a

decision in any given matter. It permits the court to deal with a matter based on the justice as required by the circumstances of the case under consideration.

Since the proceedings had commenced prior to the CPR becoming operative, recourse must be had to the transitional arrangements provided for by the new Rules. The transitional procedures are embodied in the provisions of Rule 73 of the Rules. Rule 73.4 (6) designates the pivotal point of this application. It is outlined as follows:

> "The court may restore the proceedings only if –
>
> (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
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> (c) the other parties to the proceedings would not be more prejudiced by granting the application than the applicant by refusing it."

On behalf of the applicant, Mrs. Gibson-Henlin argued that the learned Chief Justice erred when he considered each provision of Rule 73.4 (6). So far as Rule 73.4(6) (a) is concerned, she urged that there were continuous delays by the respondent in the resolution of the matter and no reasonable excuse had been advanced by them. She further contended that in light of the delays, the excuse of inadvertence, as accepted by the learned Chief Justice, as a good reason for the respondent's delay in applying for case management conference, is inadequate.

In relation to Rule 73.4(6) (a), the learned Chief Justice stated that under the provisions of the Rule, the issue is not necessarily a matter of delay but whether a good reason had been proffered for the failure of the respondent to apply for case management. He added that a sanction had been imposed for the delay by way of the automatic striking out of the claim. In determining whether the respondent ought to proceed with the claim, it is manifest that the learned Chief Justice made findings applying principles under the CPR.

The learned Chief Justice did not simply take into account the fact that the respondent's attorneys-at-law, by inadvertence, failed to have a date fixed for case management. He went further. It is clear that he had also given consideration to other factors. He had taken into account the fact that Money Traders & Investments Limited's (the 2nd defendant's) and Conrad Graham's (the 3rd defendant's) failure to enter an Appearance and file a Defence led to the entry of a default judgment against them. He further illustrated that if the respondent had been able to recover from them it might not have pursued the claim against the applicant (the 1st defendant), Mr. Graham (the third defendant) and Mr. Gilzene (the fourth defendant). It is obvious that he meant that the respondent would not have found it necessary to proceed against the applicant and the Gilzenes, the 4th and 5th defendants named in the suit had the company and Conrad Graham satisfied the indebtness.

In dealing with the matter of inadvertence, the learned Chief Justice made reference to **Vashti Woods v H.G. Liquors and Crawford Parkin** SCCA No.

23/93, delivered April 1995 (unreported), in which the inadvertence of the plaintiff's attorney's-at-law in pursuing a claim expeditiously was found to be an abuse of process of the court. Although he alluded to the foregoing case, it is obvious that his decision was that in the circumstances of this case the inadvertence of the attorneys-at-law did not amount to an abuse of the court's process. There is nothing to show that the respondent had no intention of pursuing the claim. Although the respondent was obliged to have pursued the application for the case management conference in a timely manner, its failure so to do cannot be categorized as willful default or conduct which would have been held under the old rules to be an abuse of process of the court.

It was as a consequence of the foregoing circumstances that he found that the respondent had proffered a good reason for failing to make the application for case management within the prescribed period. In my judgment, in keeping with the overriding objective of the new rules, he was correct in so finding.

Mrs. Gibson-Henlin further argued that the learned Chief Justice erred when he found that the respondent's claim had a real prospect of success. Under Rule 73.4(6) (b), proceedings which have been struck out may not be restored unless it is shown that the applicant seeking restoration has a realistic prospect of success.

In assessing whether the respondent had a realistic prospect of successfully prosecuting his claim the learned Chief Justice examined the

averments in the statement of claim and the defence. Particulars of the claim show that on May 14, 1997 the applicant issued a promissory note on demand to the order of Money Traders and Investments Limited which then unconditionally endorsed the promissory note to the respondent on or about the same date. In his defence, these averments were not denied by the applicant but he pleaded that the promissory note was void and unenforceable. The applicant also claimed that the promissory note had not been fully endorsed to the respondent. The learned Chief Justice found that the respondent's claim had a realistic prospect of success. His finding was correct.

Mrs. Gibson-Henlin also complained that the learned Chief Justice failed to take into account the provisions of the Bill of Exchange Act and its requirements in respect of promissory notes.

It is my view that this submission is without merit. There is an allegation that the promissory note, was issued by the applicant on demand to Money Traders & Investments Limited, which had been fully and unconditionally endorsed over to the respondent. This the applicant had not denied. The fact that he alleges that the document was void and unenforceable does not in any way show that the learned Chief Justice ought to have taken the requirements of the Bill of Exchange Act into account. It would not have been within his province to have made a decision by taking into account the validity of the promissory note as there is no evidence that the promissory note was before him. He had

properly evaluated the averments before him and correctly found that the claim of the respondent had a real prospect of succeeding at a trial.

A further matter to be considered is the question of prejudice within the context of Rule 73.4(6) (c). Mrs. Gibson-Henlin submitted that long delay has been held to give rise to a substantial risk of the denial of a fair trial and that it is no longer a necessity to consider prejudice within the context of the decision in **Birkett v James** (supra). She further argued that the court will consider prejudice as part of its general inquiry into what is just but "it will not have to seek out prejudice or ascribe it to a particular period."

In dealing with the matter of prejudice, the learned Chief Justice stated:

> "The question of prejudice relates to the availability of witnesses who can give material evidence on behalf of the parties who might be affected by the breach."

He then made reference to the case of **Allen v Sir Alfred McAlpine and Sons** [1968] 1 All ER 543 and cited the dicta of Lord Denning MR and Lord Diplock.

He went on to state:

> "In the instant case the issue at hand concerns the validity of the promissory note. A document. There is no question of "memories growing dim or witnesses disappearing". There is no likelihood of prejudice to either the claimant or the defendants in my view."

Although he referred to **Allen v Sir Alfred McAlpine and Sons** (supra), it is clear that the principle on which he proceeded was in keeping with the CPR. Rule 1.1 confers on the court a wide discretion. It enables the court to adopt a

more flexible approach than that which prevailed under the authorities of the old rules. In my view, a controlling consideration in this case, is whether a fair trial can be achieved should the matter proceed to trial. The trial of this case will substantially be based on documentary evidence. Payments on account of the debt had been made prior to the commencement of the suit and all documents relating to the transaction would be produced in the court at the time of trial. Any decision which the trial judge makes would be significantly based on the information on the documents. Therefore, there is no risk of any party being prejudiced by the matter proceeding to trial as found by the learned Chief Justice.

It was a further complaint of Mrs. Gibson-Henlin that the learned Chief Justice's failure to award costs to the applicant amounted to an erroneous exercise of his discretion.

The matter of payment of costs is governed by Rule 64. A party is not entitled to costs unless the court decides that costs should be made after taking into consideration all the circumstances of the case. Rule 64.6(1) (2) (3) provides.

> "(1) If the court decides to make an order about costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

Rule 64(4) recites a number of factors which the court should take into account in relation to the payment of costs. There is no doubt that the learned Chief Justice had given consideration to all relevant criteria of the case. It is obvious that in the circumstances of this case, he was satisfied that each party ought to bear his own cost. He was correct in not awarding costs to either party.

The complaint of the learned Chief Justice's failure to order costs in favour of the applicant is unmeritorious.

An appellate court will not interfere with the exercise of a trial judge's discretion except it is satisfied that he had erred in law or misdirected himself on the facts as would entitle that court to say that it would be manifestly unjust to permit the order of the learned trial judge to stand. I cannot conclude that the learned Chief Justice's findings are incorrect. He had properly dealt with this case. There are no grounds which would warrant my disturbing the order made by him.

The application for leave to appeal out of time and for leave to appeal is dismissed. Costs of $8,000.00 to the respondent.