JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 83 OF 2008

BEFORE: **THE HON. MR. JUSTICE SMITH J.A.**
THE HON. MRS. JUSTICE HARRIS J.A.
THE HON. MISS JUSTICE G. SMITH J.A. (Ag.)

BETWEEN	**HOLIDAY INN JAMAICA INC.**	**APPELLANT**
AND	**CARL BARRINGTON BROWN**	**RESPONDENT**

Wendel Wilkins instructed by Ziadie, Reid & Co. for the Appellant
Miss Marsha Smith instructed by Ernest A. Smith & Co. for the Respondent.

October 7, 8 and December 19, 2008

SMITH JA.

1. This is a procedural appeal from the judgment of Brooks J. in which he ruled that Part 73.3(8) transitional provisions cannot operate to strike out a default judgment existing prior to December 31, 2002. The background is outlined in the chronology supplied by the respondent which is reproduced below:

"May 25, 2000	-	Writ of Summons filed
June 23, 2000	-	Appearance entered
July 6, 2000	-	Defence filed (but not served)
October 2, 2000	-	Interlocutory Judgment in Default of Defence filed

November 13, 2000	-	Judgment in Default of Defence Granted
April 2000(sic)	-	Assessment of Damages set for hearing
April 10, 2008	-	Notice of Application for Court Orders to Set Aside Interlocutory Judgment in Default of Defence."

The appellants sought two orders in their application of the 10th April. The first order was that "the claim be struck out by virtue of Rule 73.3(8) for failure to comply with Rule 73.3(4) of the Civil Procedure Rules" and as an alternative the second order was that the Interlocutory Judgment entered herein in Default of Defence filed on October 2nd, 2000 and all subsequent proceedings be set aside.

"June 26, 2008	-	Application to strike out proceedings heard
July 7, 2008	-	Application to strike out proceedings refused
July 11, 2008	-	Application to set aside default judgment heard and refused"

It is against the Order of the 7th July 2008 that the Appellant now appeals.

2. The following five grounds of appeal were filed:

"(a) The learned trial Judge misconstrued the law when he found that by virtue of the transitional provisions of Rule 73.3 of the Civil Procedure Rules there is a third category of old proceedings, namely default judgments in that the said Rule recognises and addresses only two categories of old proceedings i.e. proceedings with trial dates set for the Hilary Term 2003 (the Hilary Term 2003 trial cases) and the other proceedings (the non-Hilary Term 2003 cases).

(b) The learned trial Judge erred in law when he failed to find that the purpose of the Civil Procedure Rules and in particular the transitional provisions of Rule 73.3. of the Rules were to ensure that all old proceedings were case-managed by the Court and that no proceedings were to be any longer left to the parties to manage the progress or otherwise of their proceedings.

(c) The learned trial Judge misconstrued the law when he found that the transitional provisions of Rule 73.3 of the Civil Procedure Rules can not strike out old proceedings when there is a default judgment existing before December 31,

2003 in that the said default judgment constituted old proceedings to which Rule 73.3 applies.

(d) The learned trial Judge misconstrued the Appellant's application pursuant to Rule 73.3 of the Civil Procedure Rules when he treated the application as one to set aside a default judgment in that the Appellant's application was to formally strike out the Respondent's proceedings pursuant to Rule 73.3 of the Rules or alternatively to declare that the proceedings were already automatically struck out by virtue of Rule 73.3 of the Rules.

(e) The learned trial Judge erred in law when he applied the law relating to setting aside default judgments to the Appellant's application in that the relevant law to apply was Rule 73.3 of the Civil Procedure Rules and not the law regarding the setting aside of default judgments."

These grounds as formulated raise one critical issue, that is, whether the transitional provisions of Part 73.3 apply to a default judgment entered before January 2003.

3. Rule 73.3 so far as relevant for the purpose of this appeal reads:

> "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) ...
>
> (3) ...
>
> (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) ...
>
> (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."

4. It seems to me that a possible answer to the issue identified is simply that the transitional provisions of Part 73.3 do not apply to a **judgment**, they only apply to **proceedings** and it does not matter that the judgment was obtained by default and was interlocutory. In the instant case, the proceedings were commenced by the filing of a writ and came to an end on the entering of a judgment in default with damages to be assessed. All that is left to be done is the quantifying of damages. The defendant cannot dispute liability at the assessment hearing. The issue of liability is res judicata. However, as the Court did not have the benefit of submissions on whether or not the word 'proceedings' in Part 73.3 includes an interlocutory default judgment, I will not proceed to consider this appeal on this basis.

5. It was not disputed that an assessment of damages hearing is a 'trial' within the context of Rule 73.3(4) (**See Leroy Mills v Lawson and Skyers (1990) 27 J.L.R. 196).** Likewise, it is indisputable that the provisions of Rule 73.3(8) have the effect of striking out 'old proceedings' that do not have trial dates in the Hilary Term and for which no application has been made for case management. (**See Ian Wright & Ors v Workers Savings and Loan Bank SCCA No. 26/2006 02.06.06**). The learned judge stated that it would seem that Rule 73.3(8) should apply to default judgments entered before December 31, 2003 but was of the view that due to the status of a default judgment, Rule 73.3(8) could not apply. He expressed his position thus:

> "A judgment (even a default judgment), of this court is something of value; it must be obeyed until it is set aside. A default judgment is, admittedly, usually the result of administrative action (and so it was in this case). In my view, however, it may only be set aside by a judicial process. This is so regardless of whether the regime is that of the CPC or the CPR."

Later, he said:

> "Is it permissible for a rule of procedure, especially without specifically so stating that to be the intention, to set aside a judgment of this court? I answer in the negative.
>
> It has oft been said, that the CPR, being rules of procedure, cannot override the provisions of a substantive Act of Parliament... I take a similar stance in respect of judgments of this court. They cannot be set aside inferentially, by rules of procedure."

He then concluded that although the default judgment in this case existed before December 31, 2003 and had no trial date set in the Hilary Term and no case management conference had been applied for, it was not struck out by the provisions of Rule 73.3(8).

6. Counsel for the appellant, Mr. Wilkins, submitted that there was no good or logical reason to distinguish between default judgments made before December31, 2003 and those made after. He argued that regardless of the stage of the proceedings, it was necessary for the proceeding to be case-managed in order to fulfil the objective of the new rules that all cases should be controlled and driven by a Judge. Making such a distinction would create an unnecessary

anomaly in judgments. He further submitted that there was nothing illegal or invalid about Rule 73.3(8) striking out a default judgment entered before December 31, 2003 because the Civil Procedure Rules were made pursuant to the statutory authority given in the Judicature (Rules of Court) Act.

7. Counsel for the respondent, Miss Marsha Smith, on the other hand, submitted that default judgment proceedings existing before December 31, 2003 should be excluded from Part 73.3 because of the stipulation that in order to bring the old proceedings under the new regime, the relevant party must apply for a case management conference. She contended that it could not apply because under the new regime, a default judgment is not subject to case management. All that the Rules require is that the Registrar fixes a date for assessment of damages.

8. A default judgment is, as the learned judge rightly said, a valid judgment recognised by the Court and binding on the parties unless or until it is set aside by an order of the Court. A default judgment with damages to be assessed is a matter in which the issue of liability is regarded as being determined and the issue of the quantum of damages remains to be determined to the extent that the Claimant is able to prove the damages being claimed. At the assessment hearing, there can be no challenge by the defendant as to liability or quantum of damages. This is evident from Part 12.13 of the Rules which provide:

> "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are-
>
> (a) costs
>
> (b) the time of payment of any judgment debt;
>
> (c) enforcement of the judgment
>
> (d) ..."

Strictly speaking then, once obtained, the default judgment itself is not subject to any further procedure prescribed in the Rules other than the provisions for setting aside.

9. It follows that if Part 73 is to be regarded as applying to default judgments with damages to be assessed, it would apply only so far as assessment of damages is concerned. In this case, since no date was set for the assessment of damages, the effect of the application of Rule 73.3(8) would be to strike out only that aspect of the proceedings relating to the assessment of damages. The consequence of that would be that the default judgment would not be governed by the old rules because they no longer apply and would not be subject to the new rules because it was not incorporated under the new regime. Thus, it would remain suspended between the old rules and the new rules. Surely, such an unworkable result could not have been intended by the Rules. It seems to me therefore, that Rule 73.3(8) was not designed to apply to old proceedings in respect of which default judgments have been obtained. The

learned judge was therefore correct in finding that "Rule 73 cannot and does not seek to strike out a claim where a judgment of the court exists at that date". The question that must now be answered is how can a default judgment be incorporated into the regime of the new rules? Does Part 16 have that effect?

10. Part 16 of the CPR governs procedure by which a hearing to assess damages is fixed. Rule 16.2 concerns an application for a default judgment to be entered under Rule 12.10(1)(b). By virtue of the latter, a default judgment on a claim for an unspecified sum of money shall be judgment for the payment of an amount to be specified by the court. Rule 16.2(2) places a duty on the Registry to fix a date for assessment of damages where the claimant is in a position to prove the amount. Where the claimant states that he is not in a position to prove the damages at the time of the application, he must say when this can be done. Thereafter rule 16.2(4) sets out the procedure which the Registry must follow. Thus, while Part 16 provides the procedure for dealing with a default judgment obtained under the new regime, it contains no specific provision by which it may be applied to an old default judgment. In other words, Part 16 does not contain any transitional provisions for default judgments entered before the new rules came into effect. Therefore, before the procedure outlined in Part 16 can be applied, the old default judgment must be brought under the regime of the new rules.

11. By virtue of Rule 2.2(4) there exists a window for bringing old default proceedings under the new rules. Rule 2.2(4) reads:

> "Notwithstanding anything contained in Part 73 these new Rules apply to all old proceedings save for those in which a trial date has been fixed for the Hilary Term 2003 and save for applications which have already been filed and fixed for hearing in the Hilary Term, 2003."

Mr. Wilkins submitted that this could not cure the difficulty posed by the conclusion that Part 73 did not apply because in order for the new rules to apply to old proceedings, the latter must be brought under the former and Part 73 provides the mechanism for doing this. Therefore, he submitted, Rule 2.2(4) affirms Part 73 and does not derogate from it.

12. I agree with Mr. Wilkins that Rule 2.2(4) must be read in light of Part 73, for to do otherwise would render Part 73 useless. It seems to me that Part 73 contains the specific provisions regulating the transition of cases from the old regime to the new. Rule 2.2(4) which contains general provisions would apply to proceedings which by their peculiar nature were not contemplated by Part 73 and to which Part 73 would therefore be inapplicable. In light of the finding that Rule 73 does not apply to "old" default judgments, Rule 2.2(4) must therefore apply to such a default judgment with damages to be assessed. The result would then be that having been brought under the new rules by the operation of Rule 2.2(4), the default judgment proceeding with damages to be assessed would be regulated by Part 16.

13. For these reasons, I would dismiss the appeal with costs to the respondents.

14. Before leaving this matter, I feel constrained to comment on the respondent's apparent lethargy in pursuing its case to a finality. Default judgment was entered in November 2000. Up to April 2008, no date was set for the assessment of damages. In my view such delay is prima facie inordinate. It seems arguable to me that it would not further the overriding objective of the rules to allow the respondent to proceed with this matter after such a long period of dormancy. Indeed by virtue of rule 46.2(1) (a) a writ of execution may not be issued without permission where six (6) years have elapsed since the judgment was entered. I would venture to think that an interlocutory default judgment should not escape this rule. However, this particular issue is not before this Court, accordingly, I make no definitive statement in this regard.

HARRIS, J.A.

15. This is a procedural appeal against a decision of Brooks, J. in which he ordered that a claim brought by the respondent against the appellant had not been struck out.

16. On May 25, 2000, the respondent commenced an action against the appellant by way of a Writ of Summons. A Statement of Claim was also filed. On June 23, 2000 the appellant entered an appearance. A defence which was

filed on July 6, 2000 was not served. An Interlocutory Judgment in Default of Defence was entered on November 13, 2000.

17. On April 10, 2008 the appellant filed an application seeking the following orders that:

> "i. The claim be struck out by virtue of Rule 73.3(8) for failure to comply with Rule 73.3(4) of the Civil Procedure Rules.
>
> ii. Alternatively, the Interlocutory Judgment entered herein in Default of Defence filed on October 2, 2000, and all subsequent proceedings be set aside.
>
> iii. Costs of the Application to the Defendant to be agreed or taxed."

18. The learned trial judge, upon ordering that the claim had not been struck out under Rule 73.3 of the Civil Procedure Rules 2002 ('C.P.R') adjourned the application to set aside the default judgment for hearing on July 11, 2008.

19. The following grounds of appeal were filed:

> "(1) The learned trial Judge misconstrued the law when he found that by virtue of the transitional provisions of Rule 73.3 of the Civil Procedure Rules there is a third category of old proceedings, namely, default judgments in that the said Rule recognizes and addresses only two categories of old proceedings i.e. proceedings with trial dates set for the Hilary Term 2004 [sic] (the Hilary Term 2004 [sic] trial cases) and the other proceedings (the non-Hilary Term 2004 [sic] cases).

(2) The learned trial Judge erred in law when he failed to find that the purpose of the Civil Procedure Rules and in particular the transitional provisions of Rule 73.3 of the Rules were to ensure that all proceedings were case-managed by the Court and that no proceedings were to be any longer left to the parties to manage the progress or otherwise of their proceedings.

(3) The learned trial Judge misconstrued the law when he found that the transitional provisions of Rule 73.3 of the Civil Procedure Rules can not strike out old proceedings when there is a default judgment existing before December 31, 2003 in that the said default judgment constituted old proceedings to which Rule 73.3 applies.

(4) The learned trial Judge misconstrued the Appellant's application pursuant Rule 73.3 of the Civil Procedure Rules when he treated the application as one to set aside a default judgment in that the Appellant's application was to formally strike out the Respondent's proceedings pursuant Rule 73.3 of the Rules or alternatively to declare that the proceedings were already automatically struck out by virtue of Rule 73.3 of the Rules.

(5) The learned trial judge erred in law when he applied the law relating to setting aside default judgments to the Appellant's application in that the relevant law to apply was Rule 73.3 of the Civil Procedure Rules and not the law regarding the setting aside of default judgments."

20. The critical issue arising from these grounds is whether the statement of claim filed by the respondent had been automatically struck out by virtue of the provisions of Rule 73.3 (8) of the C.P.R.

21. It was submitted by Mr. Wilkins, that the learned judge misconstrued the law by finding that under Rule 73.3(1) three categories of cases were permissible. Rule 73.3(1) admits only proceedings in which trial dates were fixed for the Hilary Term 2003 and other cases in which no trial date had been fixed, he argued. It was his further submission that while cases fixed for trial within the Hilary Term would be disposed of by applying the rule, all other cases, including those in which default judgments were entered would fall within the scope of Rule 73.3(4) and would be subject to case management. If no application for case management conference had been made by December 31 2003, then, the claims would have been automatically struck out, he argued.

22. Miss Smith argued that the learned judge was correct in his approach in finding that Rule 73 was inapplicable to matters in which default judgments were entered prior to December 31, 2003. Rule 16 of the C.P.R., she argued, in outlining the procedure to be adopted in respect of a default judgment, demonstrates that case management conference is not a pre-requisite for an assessment of damages following the entry of such judgment.

23. The learned trial judge first outlined the law with respect to the transitional procedure from the Civil Procedure Code to the Civil Procedure Rules which has been circumscribed in the decisions of this court in the cases of **McNaughty v. Wright & Ors** S.C.C.A. 20/2005, delivered on May 25, 2005 and

Wright & Ors v. Workers Savings & Loan Bank S.C.C.A. 26/2006 delivered June 2, 2006. He then went on to extract the principles enunciated in those cases by correctly stating that:

> "1. There were two groups of cases categorized as "old proceedings" in existence at 31st December 2003, they may be termed the "Hilary term group" and the "non Hilary term group;"
>
> 2. The Hilary term group were cases in which a trial date had been set for hearing within the Hilary term of 2004;
>
> 3. Claims in cases in the non-Hilary term group stood automatically struck out if the claimants (or defendants with ancillary claims) failed to apply on or before 31st December 2003 for a case management conference to be fixed;
>
> 4. There was a window of opportunity for revival, if an application was made on or before 1st April 2004;
>
> 5. The court has no discretion to enlarge the time within which the application for reinstatement may be made;
>
> 6. If the Hilary term group case was not disposed of at the scheduled date of its hearing in the Hilary term, then (generally speaking) the case fell thereafter under the jurisdiction of the CPR;"

24. He further said:

> "Since it is not disputed that there was no fixture for the assessment of damages in this claim during the Hilary term of 2004 (that is, no "trial date"), and since this claim is obviously "old proceedings", was Mr.

> Brown under a duty to apply for a case management conference to be fixed, and upon his failure so to do, was his claim rendered struck out? The answer, in the context of rule 73.3 (4), would seem to be in the affirmative, to both questions. I am, however, uncomfortable with such an answer. My discomfort lies in the status of the default judgment."

25. He continued by embarking on an examination of the status of a default judgment and found that such a judgment could only be set aside by judicial process, and that it remained valid and subsisting until set aside. He found that Rule 73 could not and did not operate to strike out a claim in which a judgment had been entered and was in existence on December 31, 2003.

26. Does Rule 73 make provision for the striking out of a claim in circumstances where a default judgment was in existence as of December 31, 2003? Rule 73 is silent as to the outcome of a case in which a default judgment had been entered prior to December 31, 2003. Under Rule 2.2 (4), the Civil Procedure Rules are applicable to all proceedings save and except those in which trial dates had been fixed, as well as those in which applications had been fixed for hearing during the Hilary Term 2003 notwithstanding the provisions of Rule 73. Although Rule 16.2 (1) outlines the procedure to be adopted consequent on an application for the entry of a default judgment under Rule 12.10 (1), it appears to me that it would not be inappropriate to import Rule 16 into an inquiry as to whether its provisions can be invoked in resolving this appeal.

27. Rule 16 governs the process by which fixtures for the hearing of an assessment of damages are made. Rules 16.2(2), 16.2(3) and 16.2(4) provide:

> "16.2 (2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing.
>
> (3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.
>
> (4) The registry must then fix:
>
> (a) That date for the hearing of the assessment;
>
> (b) A date by which standard disclosure and inspection must take place;
>
> (c) A date by which witness statements must be filed and exchanged; and
>
> (d) A date by which a listing questionnaire must be filed.
>
> (Rules 27.12 and 27.13 deal with the listing questionnaire and the procedure for fixing a date for a trial.)"

28. Rule 73 contains transitional provisions with respect to matters falling within the purview of the Civil Procedure Code and of the Civil Procedure Rules, 2002. Under the rule, proceedings are classified as "new" and "old". Old

proceedings are defined as those which commenced prior to January 1, 2003. New proceedings are those which commenced on or subsequent to January 1, 2003. The rules are inapplicable to old proceedings, in which a case is fixed for trial during the term commencing January, 2003.

29. Rule 73.3, so far as relevant for the purpose of this appeal reads:

> "73.3 (1) ...
>
> (2) ...
>
> (3) ...
>
> (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) ...
>
> (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) ...
>
> (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) ...

30. As prescribed by Rule 73.3(4), in old proceedings, where a trial date had not been fixed to take place during the term commencing January 1, 2003, it is incumbent on a claimant to apply for a date for case management conference. However, where the claimant omits to apply for case management conference by December 31, 2003, the proceedings are automatically struck out by virtue of Rule 73.3 (8). Signing judgment is not a proceeding, **Deighton v. Cockle** [1912] 1 K.B. 206. It follows that the entry of a judgment would not be a proceeding within the context of Rule 73.3 (8).

31. It is common ground that although judgment in default of defence had been entered, a trial date had not been fixed. There is no dispute that an assessment of damages is a trial – **Mills v. Lawson & Anor** (1990) 27 J.L.R. page 196. This the learned judge rightly found. The question, however, is whether an assessment of damages falls within the ambit of Rule 73.

32. Where a claimant is not in a position to prove quantum, the Registry is obliged to fix a trial date as prescribed by Rule 16.2. (2). Rule 16.2(2), 16.2 (3) and 16.2 (4) make express provision regarding the procedural steps to be adopted subsequent to the entry of default judgment and prior to the trial of an assessment of damages.

33. Rule 16.2 (4) specifically mandates the Registry to perform certain acts upon the receipt of a claimant's request for a date of hearing. These acts include the fixing of a date for hearing, for standard disclosure and inspection of documents as well as for the filing and exchanging of witness statements and for the filing of listing questionnaires.

34. Rule 16 prescribes its own case management regime after the entry of a default judgment. The rule does not require a claimant to make an application for a case management conference upon the entry of such judgment. It is clear that it places on the Registry the onus of putting into motion the machinery for the hearing of an assessment of damages upon a request being made by a claimant for a date of hearing.

35. It is of significance that even under Rule 16.4 where directions for trial of the issue of quantum have been given by the court, such court may exercise case management powers. This clearly demonstrates that case management prior to an assessment of damages is confined within the parameters of Rule 16.

36. Rule 73.3 (8) is subordinate to Rule 16 and must be read subject to that rule. It is clear that the drafters of the rule had not intended Rule 73 to include matters in which default judgments had been entered. If they had so intended then Rule 73 would have expressly provided therefor. In my judgment, Rule

73 does not require a claimant to apply for case management conference in circumstances where a default judgment has been entered.

37. Until set aside by an order of the court, a default judgment remains valid and in force as rightly found by the learned judge. Rule 16 makes specific provision for case management after a default judgment has been entered and before a hearing date for an assessment of damages. It follows therefore, that there would have been no obligation on the part of the claimant to have applied for case management conference as Rule 73.3. (4) does not require an application for case management in circumstances where a default judgment has been entered.

38. The learned judge was correct in refusing to strike out the claim. He had, however, erroneously found that in the circumstances of this case, there is at least a third category of "old proceedings" namely, claims where default judgments have been entered prior to "December 31, 2003". Only two groups of old proceedings are permitted by Rule 73 namely, those in which trial dates had been fixed for the Hilary Term 2003 and those in which no trial dates had been in existence as of January 2003, as propounded in **McNaughty v. Wright & Ors and in Wright & Ors v. Workers Savings & Loan Bank** (Supra). The rule does not create a third category of old proceedings. This notwithstanding, the learned judge had rightly concluded that where a judgment exists as of

December 31, 2003, Rule 73 does not in any way influence the striking out of the claim.

39. I would dismiss the appeal with costs to the respondent.

G. SMITH., J.A. (Ag.)

I agree.

SMITH, J.A.

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.