

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 20/2005

BETWEEN	NORMA MCNAUGHTY	APPELLANT
A N D	CLIFTON WRIGHT	1st RESPONDENT
A N D	WARDER GORDON	2nd RESPONDENT
A N D	SUPT. R.G. WILLIAMS	3RD RESPONDENT
A N D	COL. JOHN PRESCOD	4th RESPONDENT
A N D	THE ATTORNEY GENERAL	5TH RESPONDENT

April 29 2005 and May 25, 2005

PROCEDURAL APPEAL

Written submissions by **Rudolph Smellie** for appellant

Written submissions by **Annaliesa Lindsay** and **Julie Thompson** for the 2nd, 3rd 4th, and 5th respondents

SMITH, JA:

This is a procedural appeal which concerns the extension of time within which to apply for the restoration of proceedings which were automatically struck out by virtue of Rule 73 of the Civil Procedure Rules (CPR) 2002.

Background Facts

The facts as gleaned from the written judgment of Campbell J and from the written submissions are to the following effect. The appellant, Norma McNaughty, and the 1st respondent, Clifton Wright were common law wife and husband. The appellant alleges that on the 20th November, 1998, the 1st respondent, who was a prisoner at the General Penetentiary, was escorted to her home by the 2nd respondent, a warder. While at her home the 1st respondent assaulted and wounded her.

The appellant filed a Writ of Summons and Statement of Claim in the Court below on October 28, 2002. The claim against the 2nd, 3rd, and 4th respondents was in damages for negligence. The 5th respondent was joined by virtue of the Crown Proceedings Act. These respondents were served on February 14, 2003.

The defences of the respondents were filed out of time on October 7, 2003, with the appellant's consent.

On April 14, 2004, counsel for the appellant applied to the Registrar of the Supreme Court to have the matter fixed for a Case Management Conference pursuant to Rule 73.3(4) of the CPR. A Notice of Appointment for Case Management Conference dated September 3, 2004 was issued fixing the Case Management Conference for January 21, 2005. On the 18th January 2005, the respondents filed a Notice of a Preliminary point and at the Conference, counsel for the respondents took the point that

the Court had no jurisdiction to hear the matter because by virtue of Rule 73.3(7) the claim had been struck out. Faced with these formidable submissions, counsel for the appellant requested and was given time to respond to them. Apparently, he could not answer them, and on the 28th January, 2005, counsel for the appellant filed a Notice of Application for Court Orders. By this application the appellant sought an order extending the time to apply for the restoration of the proceedings and an order restoring the proceedings.

Before Campbell J, the respondents' counsel again took a preliminary point that the appellant having failed to apply for the restoration of the proceedings by the 1st April, 2004, the Court was **functus officio** and had no jurisdiction to entertain the application.

Counsel for the appellant conceded that the claim was automatically struck out but submitted that Rule 73.4(4) must be read subject to Rule 26.1(2) (c) which gives the Court a general power to enlarge the time. The learned trial judge upheld the respondent's submissions and dismissed the applications on February 11, 2005.

On the 18th February, 2005, Notice of Appeal and Grounds of Appeal were filed. However, written submissions were not filed and served with the Notice of Appeal as required by Rule 2.4(1) of the Court of Appeal Rules.

On the 28th February, 2005, the respondents were served with the Notice of Appeal. On March 7, 2005, the respondents wrote to the appellant pointing out the irregularities in the appellant's appeal. On March 7, 2005, the appellant, by Notice of Application for Court Order, sought an order for the extension of time to the 7th March, 2005 for the filing and serving of the written submissions in support of the procedural appeal. The appellant's written submissions were filed with this Notice of Application for extension of time. In paragraph 3 of his affidavit in support of the application counsel for the appellant swore that the Notice of Appeal was filed and served on the 8th February, 2005.

On the 14th March, 2005, I granted the extension of time sought thereby validating retrospectively the late filing and serving of the written submissions.

The written submissions of the respondents in response to the appellant's written submissions, although filed in the Registry of this Court on the 11th March, 2005, were brought to my attention after I had, on the 14th March, granted the application for extension of time in which to file and serve the written submissions. In their submissions, counsel for the respondents stated that the respondents were only served with the Notice of Appeal on February, 28, 2005. This is contrary to the affidavit evidence of counsel for the appellant. The acknowledgment of service was sent to

the Registrar on the 15th April, 2005. This confirms that counsel for the respondents were served, as they stated, on February 28, 2005.

This means that the appellant would not only need leave to file the written submissions out of time but would also need an extension of time to serve the respondents with the Notice of Appeal and the written submissions. It is therefore my view that this procedural appeal has not been perfected. However, since the respondents have submitted written submissions, it is arguable that they have waived the irregularities. In the circumstances, I will proceed to the appeal.

The Procedural Appeal

This is an appeal pursuant to Rule 2.4(3) of the Court of Appeal Rules. The appeal is from an Order made by Campbell J on February 11, 2005. By this order the learned judge dismissed the appellant's application for an extension of time within which to apply for the restoration of her claim which was struck out by virtue of Rule 73.3(7).

The appellant filed some 8 grounds of appeal.

These grounds raised two main issues:

1. Whether or not the Court has the discretion, by virtue of Rule 26.1(2) (c) of the CPR, to enlarge the time prescribed by Rule 73.4(4) for making an application for the restoration of proceedings struck out by virtue of Rule 73.3 (7).

2. If the Court has such a discretion, whether or not the appellant had given a good reason for failing to apply for restoration within the time prescribed. It should be noted that even if these issues were determined in favour of the appellant the court may restore proceedings only if satisfied that the conditions stipulated in rule 73.4(6) were met.

**Whether a Court has a discretion to enlarge the time to apply for
restoration by virtue of Rule 26**

Counsel for the appellant submitted that Rule 73.4(4) must be read subject to Rule 26.1(2)(c). Counsel for the respondents submitted that the appellant was bound by the time limits specified by Rule 73.4 (4) notwithstanding the general powers given by Rule 26.1(2)(c). Counsel for the respondents relied on the maxim **specialia generalibus derogant**. Further, counsel argued that Rule 26.1(2) (c) does not apply because the Rules provide otherwise.

To resolve this issue the provisions of Rule 73 must be examined closely. The Civil Procedure Rules (CPR) came into effect on the 1st January, 2003. Rule 73 makes provisions for the transition from the former rules to the new rules. Proceedings commenced before these rules came into effect are referred to as "old proceedings". The CPR apply to all proceedings commenced on or after the 1st January, 2003. These Rules do not apply to any old proceedings in which a trial date has been

fixed for the trial to take place within the first term after the 1st January, 2003 – see Rule 73.3(1).

Where, in any old proceedings a trial date has not been fixed to take place within the first term after the 1st of January, 2003, it is the duty of the claimant to apply for a Case Management Conference to be fixed - Rule 73.3(4):

When a date is fixed by the registry for case management conference the claimant must give all parties notice of such date – Rule 73.3(5). The CPR, that is, the new Rules apply to old proceedings from the date that notice of the case management conference is given – Rule 73.3(6).

Rule 73.3.(7) is critical. It reads:

“(7) Where no application for a case management conference to be fixed is made by the 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.”

Thus, where in respect of any proceedings commenced before the 1st January, 2003 a trial date has not been fixed to take place within the 2003 Hiliary Term the claimant has up to the 31st December, 2003 to apply for a case management conference. Failure to make such an application timeously will result in the automatic striking out of the claim.

However, a claimant is given an opportunity to restore the proceedings under Rule 73.4. Rule 73.4(1) directs that a list of all

proceedings struck out must be displayed in a prominent position in the registry between 1st January and 31st March, 2004. By virtue of Rule 73.4 (2) the fact that the list has been displayed must be advertised in a newspaper on three occasions not less than two weeks apart.

Paragraphs (3) and (4) of Rule 73.4 read:

"(3) Any party to proceedings which have been struck out under Rule 73.3(7) may apply to restore the proceedings.

(4) The application must be made by 1st April, 2004."

Paragraph (6) provides that a 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 appellant has a realistic prospect of success in the proceedings;

and

(c) the other parties to the proceedings would not be more prejudiced

by granting the application than the applicant by refusing it.

The applicant's application to restore the proceedings was filed on January 28, 2005 some nine (9) months after the time prescribed by 73.4(4). Rule 26.1 (2) (c), on which the appellant relies reads:

"Except where these Rules provide otherwise the court may –

(a)...

(b)...

(c) extend or shorten the time for compliance with any rule practice direction, order or direction of the court, even if the application for an extension

is made after the time for compliance has passed, ..."

Mr. Smellie, in support of his contention that Rule 74.4(4) must be read subject to Rule 26.1(2) (c), referred to what he described as the mandatory provisions of paragraphs (1) and (2) of Rule 73.4 which he said, were never carried out. These provisions, he argued, "envisaged that a prospective applicant for restoration would be given timely notice of the striking out of his/her proceedings." This, he contended, was presumably to enable such applicant to make the requisite application by the 1st of April or as soon as possible thereafter.

Counsel for the respondents contended that the provisions of paragraphs (1) and (2) of Rule 73.4 did not make an application to restore proceeding conditional on notice being given to the claimant.

I am inclined to agree with counsel for the respondents that paragraphs (1) and (2) of Rule 73.4 were not intended to make an application for restoration conditional on their provisions being complied with. If this were so then Rule 73.4 would say so and contain provisions as to the consequences of the failure of the registry to comply and the procedure thereafter.

I am unable to conclude that these paragraphs were intended to notify the claimant of the striking out of the claim and thus, by implication, would indicate that the court has a discretion under Rule 26.1(2) (c) to enlarge the time beyond the 1st of April, 2004.

In my view Rule 26 does not apply to Rule 73 for the following reasons:

1. Rule 26 concerns the powers of the court in case management proceedings under the new Rules. Rule 73 was enacted specifically as transitional provisions. The scope of these transitional provisions is stated in Rule 73.1 (1) to be:

"1(1) This Part deals with the extent to which the former rules remain in force after these Rules come into force and the way in which actions, matters and other proceedings in existence as at the commencement date become subject to these Rules".

The procedure to bring the appellant's claim within the purview of the CPR was completely ignored. It is clear, in my view, that the Court's general powers of case management under Rule 26 do not apply to the transitional provisions of Rule 73. Accordingly Rule 26.1 (2) (c) does not invest the court with the discretion to enlarge the time specified under Rule 73.4(4).

2. Rule 26.1 (2) (c) specifically excludes its application "where these Rules provide otherwise". Paragraphs (3) and (4) of Rule 73.4, in providing relief from the striking out sanctions, are in effect giving the court a discretion to order an enlargement of the time period stipulated in rule 73.3(7) within which an application for case management conference may be made. In this regard Rule 73.4 (4) states specifically that the application must be made by the 1st April, 2004. Rule 73, in my

view, provides its own regime for dealing with the transition from the old to the new. It has clearly set a final cut-off time to apply for Case Management Conference in respect of proceedings commenced before the 1st January, 2003 and for which no trial date has been fixed to take place within the first term after the 1st January, 2003. That final cut-off time is the 1st April, 2004. I therefore conclude that Rule 73 "provides otherwise" and is clearly not intended to be read subject to Rule 26.1(2) (c) .

3. Rule 73.4(3) gives a claimant a right to apply to restore proceedings struck out under Rule 73.3(7). Subsection (4) limits the time within which this right may be exercised.

Now rule 26.1(2) (c) empowers the court generally to extend the time for compliance with any rule, etc. In my judgment, rule 26.1(2) (c) does not empower the court to extend a limitation period set by a rule for the exercise of a right. This rule deals with the failure to comply with a rule in relation to proceedings before the court not with a failure to exercise a right to apply to restore proceedings. Indeed, the foregoing is illustrative of reason No. 1.(supra) in so far as rule 26 is intended for and applies only to the court's management of cases.

For the above reasons, I have come to the conclusion that the contention of counsel for the appellant, that Rule 73.4(4) must be read subject to Rule 26.1 (2) (c) , is untenable.

In the light of this conclusion it is not necessary for me to consider the issue as to reasonable excuse for the delay. Nonetheless, I am constrained to repeat what the Court of Appeal has said **ad nauseam** namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the Court and compliance with the rules of the court are the foundation for achieving the overriding objective of enabling the court to deal with cases justly.

For the above reasons this procedural appeal is dismissed.

In the light of the fact that the non-compliance with the rule and the delay in applying for restoration were due to the "misreading/ misunderstanding of the Rules" by counsel for the appellant, I think it is only fair that the costs in the court below and of this appeal should be paid by counsel for the appellant. I therefore, so order.