

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT**

CIVIL DIVISION

No. 861 of 1990

BETWEEN:

ASHA MIRCHANDANI

FIRST PLAINTIFF

(Familiarly known as Mrs. Ram Mirchandani)

RAM MIRCHANDANI

SECOND PLAINTIFF

McDONALD FARMS LIMITED

THIRD PLAINTIFF

AND

CARIBBEAN BROADCASTING CORPORATION

DEFENDANT

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Sir Richard Cheltenham Q.C. and Mr. Clement Lashley Q.C. for the Plaintiffs

**Sir Henry DeB. Forde Q.C., Mr. John Connell Q.C. and Mr. Hal Mc. L Gollop Q.C. for the
Defendant**

2013: July 31

REASONS FOR DECISION

BACKGROUND

- [1] On 26 July 2013, I denied the Defendant's application to strike out the Plaintiffs' case. I also dismissed the Defendant's application to strike out parts of the Plaintiffs' affidavits.
- [2] The Court also gave the following directions for the future conduct of this matter:
1. That the applications under the Notice to Produce and the Summons for directions be set down for hearing on a date to be agreed; and
 2. That there be a Case Management Conference to resolve all outstanding issues so that the matter can proceed to trial with expedition.
- [3] It was further ordered that the issues of costs and what, if any, future directions be adjourned until Wednesday 31 July 2013.
- [4] On that date, after hearing the submissions of Counsel, I ordered that the Defendant pay the Plaintiffs' costs in respect of the Defendants' application certified for two Counsel. I also reserved the right to give reasons for my decision. I give those reasons now.
- [5] The reasons will be prefaced by the submissions of Counsel.

THE DEFENDANT'S SUBMISSIONS

- [6] Sir Henry submitted that the issue of costs ought to be decided under the *Supreme Court (Civil Procedure) Rules 2008* ("*the CPR*"). A trial date had not been fixed but a Summons for Directions had been issued. The matter proceeded under the *CPR* and, therefore, a Case Management Conference ought to be fixed so as to deal with all outstanding matters on both sides. He stated that the case was part of a "quadrilogy" (a group of four related cases) and suggested that the Court should request the Registrar of the Supreme Court to have the matter dealt with as soon as possible.

- [7] Sir Henry also submitted that, in respect of the award of costs, the Court had discretion to award costs under the *Rules of the Supreme Court, 1982* (“*the RSC*”) or the *CPR*. The rule that costs follow the event is only one of the applicable principles.
- [8] He urged the Court to take into account its finding in the substantive decision that the period of delay in respect of which the application was brought, was inordinate. There was, therefore, some justification for the bringing of the application to dismiss the Plaintiffs’ case. That application allowed the matter to be tested as to whether or not the Court ought to exercise its discretion in the Defendant’s favour.
- [9] Sir Henry further submitted that the Court ought to view the matter against the background of its finding, in relation to the correspondence between himself and Mr. Peter Williams Q.C., which would have led the parties to believe that there would be no application to strike out.
- [10] Counsel conceded that he was not seeking to nullify the Court’s finding that there was an excusable reason for the delay.
- [11] He also submitted that the Court should consider an order that the costs be costs in the cause subject to a modification that a percentage of the costs of the application to dismiss be considered in relation to the costs which might be finally awarded in the cause.
- [12] Sir Henry further submitted that the issue of costs fell to be considered under the *CPR* through the application of *Part 73.4 CPR* and that the Court ought to exercise its discretion under that rule whilst having regard to the overriding objective in *Part 1.1(1) CPR*.

THE PLAINTIFFS’ SUBMISSIONS

- [13] Mr. Lashley Q.C. (“Mr. Lashley”) agreed with Sir Henry’s submission that the Case Management Conference should be set as soon as possible to resolve the outstanding issues on the Summons for Directions and the notices thereunder. He, however, disagreed with Sir Henry’s submission that the matter fell to be decided under the *CPR*. The matter was an old matter and, therefore, the *RSC* applied. He submitted that under the *RSC* costs followed the event. The Plaintiffs’ were successful in resisting the application to strike out and ought to be awarded their costs. He cited “**A Practical Approach to Civil Procedure**” by **Stuart Syme** at **Page 460** to support this argument.

- [14] He did concede that under both the *RSC* and the *CPR*, the Court had discretion to exercise its powers in relation to costs and submitted that the Court's discretion should be exercised in the Plaintiffs' favour. The discretion ought to be exercised judicially and not arbitrarily.
- [15] Mr. Lashley cited a number of related matters in which the Plaintiffs were successful and were awarded costs and one other matter in which costs were not awarded. He urged the Court to adhere to the rule that costs followed the event.
- [16] He submitted that the Court made findings in respect of delay for which the Defendant was responsible and submitted that this was also a relevant factor in determining the issue of costs.

DISCUSSION

- [17] It is first necessary to deal with the issue of which regime is applicable, the *RSC* or the *CPR*, before embarking on the issue as to who should bear the costs. This involves an analysis of the transitional provisions of the *CPR*.
- [18] The substantive matter was filed on 26 June 1990. This present application was filed on 7 December 2004. It is clear, therefore, that the proceedings were commenced before 1 October 2009, the commencement date of the *CPR* ("the commencement date").

THE LAW

- [19] The transitional provisions are found in *Part 73 CPR*. *Part 73.1 CPR* provides:
- "This Part deals with the extent to which the former *Rules of the Supreme Court, 1982* and any amendments heretofore made to them 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."
- [20] *Part 73.2 CPR* deals with new proceedings and provides that the *CPR* apply to all proceedings commencing on or after the commencement date.

Proceedings Commenced Under the RSC

[21] *Part 73.3(1) CPR* provides that the *CPR* "...do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned."

[22] By virtue of *Part 73.3(2) CPR* it is further provided that "In proceedings commenced before the commencement date, an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard."

[23] The other provisions of *Part 73 CPR* are set out verbatim:

"Part 73.3 (3): Where a trial date has not been fixed in proceedings that commenced before the commencement date,

(a) the Registry must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days notice of the conference; and

(b) these Rules apply from the date of the case management conference given under paragraph (a).

(4): Where a Summons for Directions has been taken out in proceedings commenced before the commencement date, the parties may agree in writing to have the case referred to a case management conference; and if the parties so agree, these Rules will apply to govern the future conduct of the case from the date of the case management conference."

[24] I refer again to the wording of *Part 73.3(1) CPR* as set out at paragraph [21] above. It is beyond doubt that no trial date was set in this matter before the commencement date.

Consequently, there was no application to adjourn a trial date, so as to invoke the provisions of *Parts 73.3(1) and (2) CPR*.

[25] This Court, as part of its directions given on 4 August 2013, ordered a Case Management Conference which has been set, with the consent of all Counsel, for October 2013. The setting of the Case Management Conference was consistent with the fact that there are three other related matters, which this Court had previously set for Case Management Conference, namely:

1. S/C Suit No. 1702 of 1990 McDonald Farms Limited et al v The Nation Publishing Company Limited;
2. S/C Suit No. 344 of 1989 McDonald Farms Limited et al v The Advocate Company Limited; and
3. S/C Suit No. McDonald Farms Limited v Barbados Rediffusion Service Limited.

These three matters together with the present case comprise the quadrilogy to which Sir Henry referred.

[26] The Court felt that the procedure directed would ensure that all four matters receive the attention of the Court or the Master of the Supreme Court in ensuring that they are brought on for trial with expedition. No further directions were proffered by Counsel.

[27] The matter had not reached the stage for the Registrar to invoke her jurisdiction, therefore, no date, time or place was fixed by the Registrar pursuant to *Part 73.3(a) CPR* so as to make those rules applicable. The transitional provisions are posited upon the Registrar exercising her jurisdiction and giving the appropriate 28 days notice of the Case Management Conference to all sides.

[28] A Summons for Directions was taken out on 23 June 1992. The parties never agreed in writing to have the matter referred to a Case Management Conference. Those things having not been done, the *CPR* were not triggered and, therefore, could not govern the future conduct of the case. I, therefore, considered *Part 73.3(4) CPR* to be inapplicable to this matter.

- [29] There is a qualitative difference between a Case Management Conference and a Summons for Directions hearing. The Court’s case management powers under the *CPR* are much greater than those under the former *RSC*.
- [30] The overriding objective is important in guiding the court in this exercise. This is seen in *Parts 1* and *25 CPR* which are set out later in this decision. Under the *CPR* the Court’s case management powers drive the future conduct of the case, unlike under the *RSC* where the pace of litigation was driven by counsel.

The Court’s Exercise of Discretion

- [31] Sir Henry submitted that the Court should exercise its discretion applying the principles set out in the overriding objective. Mr. Lashley did not specifically respond to this submission. *Part 73.4 CPR* provides that:

“Where in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Parts 1 and 25.”

- [32] *Part 1 CPR* provides as follows:

“The Overriding Objective

- 1.1** (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) Dealing justly with a case includes, so far as is practicable,
- (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate to;
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and

- (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
and
- (e) allotting to it an appropriate share of the court's
resources, while taking into account the need to
allot resources to other cases.

Application of the overriding objective by the court

- 1.2** The court must seek to give effect to the overriding objective when interpreting these Rules or exercising any powers under these Rules.

Duty of the parties

- 1.3** The parties are required to help the court to further the overriding objective.”

[33] Under and by virtue of *Part 25.1 CPR*:

- “(1) The court must further the overriding objective by actively managing cases.
- (2) The active management of cases includes
 - (a) identifying the issues at an early stage;
 - (b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the other issues;
 - (c) encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate, and facilitating the use of such procedures;
 - (d) encouraging the parties to co-operate with each other in the conduct of proceedings;

- (e) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;
- (f) deciding the order in which issues are to be resolved;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step will justify the cost of taking it;
- (i) dealing with as many aspects of the case as is practicable on the same occasion;
- (j) dealing with as many aspects of the case as it appears appropriate to do so, without requiring the parties to attend court;
- (k) making appropriate use of technology;
- (l) giving directions to ensure that the trial of the case proceeds quickly and efficiently; and
- (m) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application.”

[34] It seems to me that **Part 73.4 CPR** is predicated upon proceedings commenced before the commencement date being proceedings to which the transitional proceeding of **Part 73 CPR** properly apply. Put another way, once old proceedings come properly within the **CPR** in the manner outlined in this decision, the Court, in exercising any discretion in relation to the future conduct of the case, may take into account the principles set out in the **CPR**. It is then, and only then, that **Part 25** is applicable since case management would become a central feature of the future conduct of the case. In addition the issue of Alternative Dispute Resolution (“ADR”) as outlined in **Part 25.1(2)(c) CPR** would fall to be considered by the court. Case management and ADR were not provided for under the **RSC**.

[35] There is one other factor that I consider of importance in this matter, namely the quantification of costs if this matter fell to be considered under the *CPR* as distinct from the *RSC*. Under the *RSC* if the parties cannot agree costs, quantum would be in the discretion of the Registrar. This is an interlocutory application. Should the costs regime under *Part 65.11(7) CPR* be applied the Plaintiffs would be disadvantaged, since they would be limited to a one-tenth percentage of the prescribed costs. Under the circumstances surrounding this case no opportunity would have been provided for the parties to make an application for budgeted costs in a matter which is not very straightforward and in which much effort and expense have already been expended.

DISPOSAL

[36] In the circumstances, the Court was of the opinion that *Part 73.3 CPR* does not apply to this matter and, consequently, the matter remains to be governed by the *RSC*.

[37] In its decision of 26 July 2013, the Court found that the delay caused by the Plaintiffs was inordinate but not contumelious. It also found that the Defendant, too, was guilty of delay and ought not to have left its outstanding applications pending. The conduct of the parties is an issue which affects quantum of costs as well as entitlement. Having regard to all the circumstances of this case, I saw no reason to depart from the principle that costs follow the event.

[38] Accordingly, I ordered that the Defendant pay the Plaintiffs' costs of the application certified fit for two counsel to be taxed if not agreed.

William J. Chandler
Judge of the High Court