REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-186 of 2016
Claim No. CV 04374 of 2015

BETWEEN

RAIN FOREST RESORTS LIMITED
SUPER INDUSTRIAL SERVICES LIMITED
Appellants

AND

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED
Respondent

Civil Appeal No. P- 190 of 2016
Claim No. CV 04374 of 2015

BETWEEN

SUPER INDUSTRIAL SERVICES LIMITED
Appellant

AND

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED
Respondent

PANEL: **R. Narine, J.A.**
J. Jones, J.A.
P. Rajkumar, J.A.

APPEARANCES:

Mr. R. L. Maharaj S.C., and Mr. N. Ramnanan instructed by Ms. V. Maharaj for the first Appellant.

Mr. N. Bisnath instructed by Mrs. L. Mendonça for the second Appellant.

Mrs. D. Peake S.C., and Mr. J. Mootoo instructed by Ms. A. Bissessar for the Respondent.

DATE DELIVERED: 23rd November, 2016.

I have read the Judgment of Jones, J.A. and I agree with it.

R. Narine
Justice of Appeal

Delivered by Jones, J.A.

JUDGMENT

1. "The responsibility for supervising the administration of civil procedure lies with the Court of Appeal. It is its responsibility to oversee, develop and control principles for the exercise of discretion under the CPR." [1] This statement by Zuckerman reflects the position taken by the House of Lords in the case of **Callery v Gray (Nos 1 and 2) [2002] 3 All ER 417** in circumstances where the House of Lords was reviewing a decision of the Court of Appeal on what was at that time a new regime for funding litigation. It encapsulates the continuing responsibility of this court, as a court of appeal, to provide guidance in the application of the Civil Proceedings Rules 1998 as amended ("the CPR") to judges, attorneys and litigants alike.

2. This case involves an examination of the decision of a trial judge on an issue that goes to the heart of the case management function of the court under the CPR. It requires this court, in accordance with its responsibility to oversee, develop and control the administration of civil procedure, to critically examine what is essentially a case

[1] Zuckerman second edition page 413 paragraph 10.47

management decision by a trial judge. This is a position that this court has not come to easily. We recognize that a court of appeal ought not lightly to interfere with a trial judge's decision in what are ultimately case management functions. We acknowledge the tremendous responsibility placed upon a trial judge under the CPR however the duty of this court is, as far as it is able, to give guidance on the application and operation of the rules so that collectively we can get it right.

3. This case requires us to scrutinize the function of the case management conference under the CPR. It also requires us to examine the role of the court and the parties in ensuring the integrity of the system of case management adopted by the CPR. Finally, while acknowledging that the very nature of case management is that it is fact dependent, this case emphasizes the need for consistency in approach and predictability in the application of the CPR.

4. The issue for determination before this court is deceptively simple: do the provisions of Part 27.3 apply to circumstances such as these. No issue of waiver or estoppel arises on this appeal. This was not a point raised before the judge nor did the judge decide the case on that basis. Indeed the case could not properly have proceeded on that basis. At issue here was the status of the action as established by the rules. The particular rule, part 27.3, provides for the claim to be automatically struck out if a case management conference had not been fixed. If the rule applied and the claim struck out it was not through any action of the appellants but rather as a result of the operation of the rule.

5. Neither is this a case where there is doubt as to the legal meaning or interpretation of the rule. There is no claim here that the rule is unclear or ambiguous. The only question

here is the applicability of the rule to these particular facts. Does the rule apply in circumstances where, according to the judge, she was actively managing the case before the filing of the defence. If the rule does apply then, by virtue of the provisions of the rule, the claim was automatically struck out subject to the ability of the National Gas Company of Trinidad and Tobago ("NGC") to apply for and be granted relief from the sanction imposed by the rule. If the rule does not apply where there has been active case management by the judge prior to the filing of the defence then, if the circumstances are such that the judge was engaged in the active management of the case, the judge was correct and the claim not automatically struck out.

6. The treatment of this case therefore requires a consideration of three questions: (i) is the purpose of the rule, part 27.3, simply to bring the parties before a judge for active case management; (ii) was the judge in fact actively managing the case in the manner contemplated by the rules; and (iii) are the circumstances of this case within the contemplation of the rule. Our answer to the first two of these questions is no. The purpose of the rule is not simply to bring the parties before the judge for active case management and in any event on the specific facts of this case it cannot be said that the judge was actively managing the case. The answer to the last question is yes. The rule specifically provides for a situation where the parties are before the judge prior to the time when, under the general rule, the case management conference is to be fixed.

The facts

7. This action began on 23rd December 2015 by way of an emergency application for injunctions made by the respondent, the claimant in the High Court, NGC, in proceedings brought against the first appellant, Rain Forest Resorts Limited ("RFR"),

and second appellant, Super Industrial Services Limited ("SIS"). The injunctions, including a freezing injunction against SIS, were granted prior to the filing of the claim form and statement of case by a judge who was not the docketed judge and were made without notice to the appellants.

8. The freezing injunction granted to NGC prevented SIS from disposing, dealing with or diminishing the value of any of its assets within the jurisdiction up to the value of $180,000,000.00. The injunction against RFR prevented it from dealing with or disposing with property of SIS the subject of mortgages and a debenture in RFR's favour. At the same time as the injunctions were granted directions were given for the filing of the claim form and the statement of case.

9. By its claim form, filed on 24th December 2016, the NGC sought against both appellants: declarations that some 5 mortgages and a debenture made between SIS and RFR over property owned by SIS were made by SIS to hinder and defraud NGC; and orders that the mortgages and the debenture be set aside and directing that the said mortgages and debenture and all statements of charge filed in respect of them be expunged from the relevant records by the Registrar General and the Registrar of Companies. The claim form also sought the injunctions obtained the day before, costs and further and/or other relief.

10. By 6th January 2016 the action had been assigned to the docketed judge. On 6th,7th and 8th of January 2016 the judge heard two applications: an application by NGC to continue the injunctions and an application by SIS to discharge the injunction granted against it. During the course of their submissions before the judge NGC indicated that the sole

purpose of the action was to prevent the assets of SIS from being dissipated pending the commencement and completion of arbitration proceedings that were to be instituted against SIS pursuant to the provisions of a contract dated 10th March 2014 between it and SIS. NGC sought to have the freezing injunction continue until the hearing and determination of the arbitration.

11. With respect to the mortgages and the debenture, during the course of the hearing on the applications, SIS asserted that no funds had passed pursuant to these transactions, that the mortgages and the debenture had been prepared in escrow and that RFR had indicated its willingness to release the mortgages and the debenture.

12. On 8th of January, at the close of the submissions, the judge made the following order:

> "Upon reading the Claimant's Notice of Application dated the 29th December 2015, the Defendants' Notice of Application dated the 29th December 2015 together with the affidavit of Romila Mathura, the exhibits and the affidavits of Winston Siriram, both affidavits sworn and filed on 29th December, and upon hearing attorney at law for the Claimant and the attorneys at law for the Defendants it is hereby ordered that the injunctions to continue until the determination of both applications and the matter is adjourned to the 29th February 2016."

13. At this stage only the claim form had been filed. In accordance with the directions given by the emergency judge on 25th January 2016 NGC filed its statement of case and, in accordance with part 10.3(1) of the CPR, both appellants filed their defences on 22nd February. NGC's defence was served on the said date while RFR's defence was

served on the following day. The statement of case and the defences confirmed the positions taken during the course of the hearing of the applications with respect to the purpose of the claim and on the mortgages and the debenture by NGC and SIS respectively. As well RFR, in its defence, confirmed its willingness to release the mortgages and the debenture.

14. On 24th February, without requiring the attendance of the parties, by an email from the judge's judicial support officer ("the JSO") the judge communicated the rescheduling of the hearing of 29th February to the parties and fixed the matter for 8th March 2016. During the period 26th February 2016 to 25th May 2016 NGC and SIS were engaged in settlement discussions initiated by SIS. Pursuant to a request by NGC, on behalf of all the parties, to adjourn the hearing for at least one month to facilitate these discussions the judge, again without a hearing, adjourned the hearing fixed for 8th March to 18th May 2016.

15. This adjournment was communicated to the parties by an email from the JSO. The subject of the email was stated to be CV 2015 -04374 National Gas Company of Trinidad and Tobago v Super Industrial Services Limited et al. The email advised the parties that the hearing in the matter scheduled for 8th March 2016 was vacated; the matter was adjourned to 18th May and that the injunction in the matter was to continue until the adjourned date. In her reasons, the subject matter of this appeal, the judge indicated that her intention was to give her decision on the applications on 8th March and also give directions for the progress of the matter.

16. By a letter dated 17th May 2016 the parties, again by communication from NGC's attorneys, requested a further adjournment of a few days to facilitate continuing settlement discussions. After some further communication between the JSO and the parties as to proposed dates, by email dated 19th May from the JSO, the parties were advised that the matter was rescheduled to 21st June 2016.

17. By letters written by attorneys for SIS, all dated 6th June 2016 and addressed to the Registrar, NGC's attorneys, and the JSO respectively, SIS referred to part 27.3(4) of the CPR and contended that in accordance with that rule the action had been automatically struck out on 22nd March 2016. They also called upon the Registrar to issue a certificate confirming the automatic dismissal of the action. As well they requested that the judge give directions for the hearing of an assessment on costs and an enquiry as to damages. In addition the letter to NGC advised that the mortgages on the property, the subject matter of the injunctions, had been released. The act of releasing the mortgages was contrary to the terms of the injunctions granted on 23rd December 2015.

18. The very next day NGC, by its attorneys, wrote to the JSO and the Registrar, advising that the position taken by SIS was incorrect and that in the circumstances that applied the matter was not automatically struck out on 22nd March. They therefore requested the Registrar to refrain from issuing any certificate to that effect. As well the letter advised the JSO that, without prejudice to the position taken in their letter, they intended to file a notice of application for an extension of time to fix a case management conference and further indicated their availability to attend before the judge at short notice. These letters were copied to the attorneys for both appellants.

19. The application referred to in NGC's letter, that is, a notice by it to extend the time for making an application for the fixing of a case management conference and seeking orders granting relief from sanctions; reinstating the claim and fixing a case management conference was filed on 7th June 2016. Thereafter the parties attended before the judge on 10th June 2016. The submissions on that date related to two issues: the status of the action and whether, by releasing the mortgages on the property the subject matter of the injunctions, the appellants were in breach of the court's orders.

The decision and orders of the judge

20. By her decision delivered on 10th June the judge determined that "the claim was not struck out pursuant to CPR 27.3(4) since that rule was not meant to come into effect where the Court had been actively managing the case before the Defence was filed." With respect to the release of the mortgages the judge held that the appellants, having failed to apply to have the orders discharged, were in breach of the orders of the court.

21. Accordingly on 10th June 2016 the judge made three orders. By the first order the judge dismissed SIS' application to have the injunction discharged and continued the freezing injunction granted on 23rd December 2015 until the hearing and determination of the arbitration proceedings intended to be commenced by NGC against SIS.

22. The second order declared that the deeds of release of the mortgages registered on 1st June 2016 be of no effect until further order and directed the Registrar General to expunge the said deeds from the records. The order also restrained SIS from dealing with the property the subject matter of the mortgages and the debenture. By this order

the judge also gave NGC permission to withdraw its application dated 7th June 2016, that is, the application that ultimately sought to fix the case management conference.

23. By the third order the judge gave directions for the further conduct of the action by granting permission to NGC to file a reply and providing for: disclosure and inspection; the filing of statement of facts and issues; the filing of bundles of documents and the filing and exchange of witness statements. The order also fixed the case management conference for 14th February 2017.

24. The position taken by the judge was simply that the rule does not apply where there has been active management of the case prior to the filing of the defence. The judge was of the opinion that:

> "…..that fact that the Court office had not sent a Notice of a Case Management Conference to the parties and the Claimant had not sought an Order extending the time for fixing a Case management conference after the 22nd March could not result in the matter being struck out given the fact that I was exercising Case Management Conference powers as early as the 7th March when the matter was adjourned and the injunctions continued. To my mind the 'matter' included the entire claim framed by the Statement of Case and defence as well as the applications to continue the injunction and discharge the said injunction."

According to the judge she was of the view that she granted the adjournments applied for by the parties pursuant to her case management powers under CPR 25.1 (c)-(e).

25. By notices of appeal filed on 14th June 2016 both SIS and RFR appealed so much of the decision of the judge whereby she found that the action was not automatically struck out in accordance with Part 27.3(4) of the CPR and that the matter was at the stage of a case management conference. In truth and in fact the judge did not determine that the action was at the stage of a case management conference but on 10th June 2016 fixed the case management conference for 14th February 2017.

26. These statements made by the judge and the view that the judge was actively managing the case reflects the position taken by NGC both before the judge and before us. In summary NGC's position is that since the purpose of the rule is to bring the parties before the judge at the earliest possibility for the purpose of active case management and since the parties were already before the judge who was actively managing the case then, the purpose of the rule having already been achieved, it would be wrong and absurd to interpret part 27.3 as applying in the circumstances. In other words the position of NGC is that part 27.3 ought not to be invoked in the particular circumstances. The appellants' position on the other hand is simply that part 27.3 is to be applied to all actions filed and that this case is not an exception.

The Rules

27. Parts 25, 26 and 27 of the CPR specifically deal with case management. A consideration of these rules reveals that a clear distinction is made between the court's general duty to actively manage cases, its powers in this regard and the staging of the case management conference as an event. These rules collectively treat with both the court's duty to manage the individual case and the tools and procedures by which the court may ensure the efficient use of its resources. In this regard these rules illustrate the

interplay between case management by the judge and case flow management established under the CPR.

28. Addressing the distinction between the concepts of case management and case flow management, in a paper presented at the Commonwealth Law Conference in September 2003 dealing with the Family Court and the Family Court Rules[2], Justice Michael de la Bastide, then President of the Caribbean Court of Justice, explained the difference in terminology in this way:

> "The terms caseflow management and case management are often used interchangeably but I prefer to recognize a difference between them. I understand caseflow management to refer to the co-ordination of the court's entire system towards the goal of timely disposition of the matters entrusted to the court. In short it deals with the timely flow of matters through the court. Case management is an element of case flow management and refers to the management of the individual case."

29. Accordingly the CPR is replete with timelines for taking steps precisely to ensure the timely disposition of matters while parts 25, 26 and 27 primarily treat with the management of the individual case. This interplay between the two concepts is recognized and fostered by the overriding objective. The CPR requires that in interpreting the meaning of any rule, or exercising any discretion given by a rule, the court must seek to give effect to the overriding objective.[3] This overriding objective requires a court to deal with cases justly.

[2] Rules of practice similar to the CPR but which were adopted before the CPR.
[3] Part 1.2 of the CPR

30. **Part 1.1 (2)** defines dealing justly with the case as including:

> "*(a)* ensuring, so far as is practicable, that the parties are on an equal footing;
>
> *(b)* saving expense;
>
> *(c)* dealing with cases 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
>
> *(e)* allotting to it an appropriate share of the court's resources,
>
> while taking into account the need to allot resources to other cases".

31. This requirement of dealing justly with an action includes elements of case flow management. A judge is required to consider expedition and proportionality in addition to ensuring that the case is treated in a manner consistent with the existence of many other cases vying for the court's attention. In this latter regard it is not only the cases docketed to the particular judge that are relevant but also the burden placed on the court system and administration by all the cases in the system. This rule therefore is concerned with the court resources in general and not simply to the workload of a particular judge.

32. **Part 25** is the first of the three rules specifically dealing with case management. This rule deals with the objective of case management and establishes the court's duty to

further the overriding objective by actively managing cases. In this regard the rule provides:

> **"** 25.1. The court must further the overriding objective by actively managing cases, which may include-
>
> *(a)* identifying the issues at an early stage;
>
> *(b)* deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> *(c)* encouraging the parties to use the most appropriate form of dispute resolution including, in particular, mediation, if the court considers that appropriate and facilitating their 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 the case or any aspect of it, where 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 his failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application".

33. **Part 26** deals with the Court's powers of management. The rule identifies aspects of the court's general powers of management. For the purposes of this appeal it is not necessary to set out the provisions of this part. Suffice it to say that this rule confirms that, insofar as the judge determined that under the rules the exercise of a court's case management powers are not necessarily limited to a case management conference, the judge was correct. It is clear that a distinction is made under the CPR between the exercise of case management powers and the conduct of a case management conference. The judge correctly referred to rules 11.1 and 17.7 as examples of such treatment.

34. **Part 27** is the last of the three rules that specifically deal with case management. The rule deals with the procedures by which the court will manage cases[4]. From this rule it is clear that integral to the management of the case is the event called the case management conference. The rule identifies the circumstances under which a case management conference is required or may be dispensed with; the necessary participants in the conference and the orders that are required to be made by a judge in the conduct of such a conference. It also identifies the period within and the method by which the case management conference is to be fixed.

[4] part 27.1.

35. In particular **part 27.5** deals with the persons who are required to attend a case management conference. It provides:

> "27.5 (1) If a party is represented by an attorney-at-law, an attorney-at-law who has conduct of the case or any attorney-at-law who is fully authorized to negotiate on behalf of his client and competent to deal with the case must attend the case management conference and any pre-trial review.
>
> (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) must attend the case management conference or pre-trial review.
>
> (3) However, the court may direct that a party or his representative need not to attend the case management conference or pre-trial review.
>
> (4) If the case management conference or pre-trial review is not attended by the attorney-at-law and the party or his representative the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 or Part 66."

36. **Part 27.3** treats with the case management conference. The rule now in existence is not the original rule. The original rule was revoked and replaced by the existing rule in July 2011. The existing rule is different from the original rule in two respects: (i) the original rule did not make provision for the time for the fixing of a case management conference where there was more than one defendant; and (ii) while the original rule made

provision for the striking out of the claim as a sanction for the claimant failing to apply for date to be fixed for the case management conference the existing rule added the word "automatically". It therefore now provides that the claim be automatically struck out.

37. The existing rule states:

"27.3 (1) The general rule is that the court office shall fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim form.

(2) Where there are two or more defendants and at least one of them files a defence, the court office shall fix a case management conference-

(a) when all the defendants have filed a defence; or

(b) when the period for the filing of the last defence has expired, whichever is sooner.

(3) If the court does not-

(a) dispense with a case management conference under rule 27.4(1) and give directions under rule 27.4(2); or

(b) give notice of a case management conference within-

(i) 14 days of the filing of a defence, where there is only one one defendant;

(ii) 14 days of the filing of the last defence, where there are two or more defendants; or

(iii) 14 days of the expiration of the period for the filing of the last defence, where there are two or more defendants,

the claimant shall within 28 days of the relevant period identified in subparagraph (b) apply for a date to be fixed for the case management conference.

(4) If the claimant does not so apply, the claim shall be automatically struck out.

(5) The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4).

(6) In considering whether the court grants relief, the court shall have regard only to whether the defendant has suffered any prejudice and rule 26.7 shall not apply.

(7) If the court grants relief, the case management conference shall take place within 28 days of the order.

(8) The application under paragraph (5) shall be made with notice and shall be supported by evidence.

(9) The case management conference shall take place not less than four weeks nor more than eight weeks after-

(a) the defence is filed where there is only one defendant;

(b) the final defence is filed where there are two or more defendants; or

(c) the expiration date for the filing of the last defence where there are two or more defendants, unless any rule prescribes a shorter or longer period or the case is urgent.

(10) However, a party may apply to the court to fix a case management conference at a time earlier than that provided in

paragraph (1) or (2).

(11) The application may be made without notice but shall state the reasons for the application.

(12) The court shall fix a case management conference on application if it is satisfied that it will enable it to deal with the case justly.

(13) The court office shall give all parties not less than 14 days notice of the date, time and place of the case management conference.

(14) The court may with or without an application direct that shorter notice be given-

(a) if the parties agree; or

(b) in urgent cases.

(15) Unless the court orders otherwise, time for fixing a case management conference shall not run in the long vacation."

38. Part 27.3 is concerned therefore with the fixing of a case management conference. The rule is very detailed as to the steps to be taken and the period within which each step is to be taken. With respect to the steps to be taken in order to fix a case management conference it is very specific. The first responsibility for doing so falls to the court office, as a general rule, then the judge and if these fail the responsibility passes to the party who instituted the claim. The rule provides strict timelines for the fixing, that is giving notice of, and the staging, that is the holding, of the case management conference.

39. With respect to those claims commenced by an ordinary claim form therefore part 27.3(1) establishes the general rule, that is, that it is the duty of the court office to fix

this event after the filing of the last defence and it fixes a time for the court office to comply with that duty. The fact that as a general rule a case management conference is to be fixed by the court office is consistent with the role of the case management conference in the flow of the case through the system and the court office's duty in that regard. The rule however contemplates that there may be circumstances where the general rule does not apply and provides for the procedure that is to be adopted in that event.

40. One of the circumstances in which the general rule does not apply is in the case of a fixed date claim[5]. By **part 27.2**, unlike claims instituted by ordinary claim form, the court office is required to fix a date for the first hearing of the claim upon the filing of the fixed date claim. In these circumstances the parties are brought before the judge much earlier than in an action commenced by ordinary claim form. At that first hearing the judge has all the powers of a case management conference[6]. Further part 27.2 (3) empowers the judge to treat the first hearing as the trial of the claim either if it is not defended or where the judge considers that the claim can be dealt with summarily. This is consistent with the fact that, in the main, the fixed date claim procedure is used for summary proceedings.

41. Notwithstanding this it is of note that, while an application for an administrative order is required to be commenced by a fixed date claim form, part 56.7(7) specifically requires that on the filing of such a claim that the court office fix a case management conference which date must be endorsed on the claim form. This is suggestive of two things: the distinction under the CPR between the exercise of case management powers

[5] part 27.3(1)
[6] part 27.2(2)

and the obligation to hold a case management conference; and the requirement that, subject to the power of the judge to dispense with it, a case management conference be held in all cases which are not treated in a summary manner.

42. In the event that no case management conference is fixed by the court office the court, in this context court must here be taken to mean the judge to whom the action has been docketed, may either fix a case management conference, and in this regard the rule provides a time frame within which it is to be done, or dispense with a case management conference under part 27.4 (1) and give directions under part 27.4(2).

43. The rule therefore recognizes that in the management of the case it may, in certain situations, be more appropriate for the judge, rather that the court office, to determine if and when a case management conference is to be held. Nonetheless it requires either strict compliance with a timeline by the judge if a case management conference is considered necessary or, in circumstances where a judge considers that a case management conference may not be necessary, provides the parameters for the exercise of that discretion.

44. These parameters are to be found at parts 27.4 (1) and (2). These rules treat with the circumstances under which a judge is permitted to dispense with a case management conference and what is required to be done by the judge in those circumstances. Under **part 27.4 (1)** a judge may dispense with a case management conference on the application of a party if that judge is satisfied that: (i) the case may be dealt with justly without such a conference; and (ii) the cost of the case management conference to the parties is disproportional to the value of the proceedings and the benefits that might be

achieved by a case management conference; or (iii) the case should be dealt with as a matter of urgency.

45. By **part 27.4 (2)** if a court dispenses with a case management conference it must immediately: (a) give directions in writing about the preparation of the case; (b) set a timetable for the steps to be taken between the giving of directions and the trial; (c) fix a date for a pre-trial review unless it is satisfied that the case can be dealt with justly without a pre-trial review and, in any event, fix (i) the trial date; or (ii) the period within which the trial is to take place and in either case the date on which a listing questionnaire is to be sent by the court office to the parties. Again, in accordance with the timely flow of the case through the system, the rule requires that these directions be given immediately.

46. If none of these steps are taken by the court office or the judge the rule requires the claimant to apply for a date for the case management conference. Again the rule specifies a time frame for so doing and, by part 27.3(4), a sanction of the claim being automatically struck out in the event that the claimant fails in this duty. The rule therefore places the responsibility on the claimant when all else fails to ensure that a case management conference is fixed and that it is fixed in a timely manner. As with the other sanctions under the CPR no step need be taken by the other side for the sanction to apply.

47. Consistent with the comprehensive nature of the rule part 27.3 also provides the manner by which the claimant can obtain relief from this sanction. In this regard of note is the fact that the rule specifically rejects the requirements of part 26.7. Part 27.3 (6)

specifically states that rule 26.7 shall not apply and only requires the court to consider prejudice to the defendant. The rule therefore provides for a much lower threshold than is usually applied for obtaining relief.

48. With respect to all other sanctions imposed by the CPR part 26.7, the relief from sanctions rule, not only requires a party to satisfy the court that (a) the failure to comply was not intentional; (b) there is a good explanation for the breach; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions but also directs the court to have regard to the interest of the administration of justice; whether the failure was the fault of the party or the attorney; whether it can be remedied within a reasonable time and if the granting of relief will affect the trial date.

49. With respect to the case management conference therefore part 27.3 is clear and detailed. It purports to provide a comprehensive procedure for the fixing of the event called a case management conference, the sanction that is to be applied upon a failure to comply with the rule and the manner of obtaining relief from that sanction. It requires the staging of this event in all cases where the claim is not dealt with summarily except where a judge determines that it is not necessary in accordance with part 27.3 (3). So that, for example, where in a fixed date claim a judge determines that a defence is to be filed part 27.3(3) applies.

Is the purpose of the rule simply to bring the parties before a judge for active case management?

50. To properly answer this question it is necessary to examine the role of the case management conference under the CPR. Without question one of the major benefits of the system under the CPR is that it accommodates a court driven process directed at bringing the parties to an expeditious resolution of the dispute. Active case management is the means by which the court achieves such a resolution. One of the benefits of the post-CPR system is that, unlike the pre-CPR system, it is not geared towards facilitating a trial of the action but rather facilitating a resolution of the dispute in a manner that does not necessarily result in a trial.

51. In the majority of cases the case management conference represents the first time that all the major players in the litigation, the litigants and their legal representatives and the judge, are brought together in the same room face to face. For some litigants this may represent the first time that they actually face their opponent since the actions that led to the dispute. For others it may be the first time they may have faced their opponent at all. For all the participants, including the judge, it is the first time that they meet with a common agenda- the resolution of the dispute.

52. The case management conference therefore usually represents the first step in actively resolving the dispute. For this reason the CPR specifically requires that if a party is represented by an attorney the attorney, or an attorney who is fully authorized to deal

with the case, as well as the litigant, or someone who can represent that litigant's interest, attend the case management conference[7].

53. From an examination of the rules it is also clear that the case management conference also marks the moment when the judge takes active control of the litigation. A number of rules therefore permit a party to take various steps prior to a case management conference but require that after that event, in order to take the very same steps, permission must be obtained from the judge.

54. So that rules 10.6 and 20.1 require the permission of the judge before any changes can be made to statements of case[8] after the first case management conference. By part 10.10 a reply may be filed with the consent of the defendant prior to the case management conference but after that event only with the permission of the judge. Part 18.4 permits the filing of an ancillary claim at any time prior to the date of the first case management conference but requires that permission be granted from the judge thereafter.

55. Similarly part 18.5 requires a defendant filing a counterclaim other than at the same time as the defence to obtain permission to do so at a case management conference. Likewise by part 19.2(2) a new party may be added without leave at any time before a case management conference but after the case management conference the permission of the judge is required.

[7] Part 27.5
[8] in the context used under the CPR to mean the equivalent to pleadings under the Orders and Rules of the Supreme Court of Judicature 1975.

56. In this regard therefore the case management conference marks the time when the litigation transforms from one that is essentially party driven, subject of course to the timelines for taking steps established by the rules, to one that is court or judge driven. It also identifies or marks the progression of the case through the system. From party driven to active management by the judge to preparation for trial and trial. It is for this reason that the rule requires that it is at the stage of the case management conference that the judge gives directions for the further conduct of the case. Even in circumstances where a judge dispenses with the case management conference the judge is required to immediately give directions for the trial. It is therefore an important event in the case flow process envisaged by the CPR.

57. That said the purpose of the case management conference is not simply to give directions for the further progress of the claim. If this were the sole purpose there would be no need to require the attendance of the parties or a person who has the authority to represent the party. Nor would there be need to emphasise the need for the attorney attending the case management conference to be fully authorized to negotiate on behalf of the party represented by that attorney or be competent to deal with the case.

58. In fact an examination of what is required in order to dispense with a case management conference confirms that a case management conference is not merely the equivalent to a summons for directions under the Orders and Rules of the Supreme Court of Judicature 1975. At a case management conference a judge is called upon to do more than just give directions. In order to dispense with a case management conference the judge must be satisfied that the case may be dealt with justly[9] without a case

[9] in this context in accordance with the overriding objective,

management conference; that the cost of holding the case management conference is disproportionate to the value of the proceedings and the benefits that might be achieved from it or, in any case, that the case be dealt with urgently[10]. It is only in those circumstances that the judge can simply give directions for the further conduct of the case[11]. The requirement of proportionality alone requires a consideration of the issues of the case.

59. In treating the case management conference as an event for the purpose of this analysis it matters not whether the event is called the first case management conference, the second case management conference or an adjourned case management conference. By the rules it is clear that 'the case management conference' marks a stage within which the rules require certain things to be done.

60. There exists however a distinction between the management of the case used by the judge to bring a case to resolution and the flow of the case through the court system. In this context therefore the case management conference as an event is integral to the system of caseflow management adopted by the CPR and to the management of the individual case. It is at the case management conference that the judge's duty to actively manage the case in the presence of all the stakeholders comes to the fore. The only other time that this is required by the CPR is at the pre-trial review[12]. Indeed **part 39.3** specifically provides that:

> "Parts 25 and 26 apply to a pre-trial review as they do to a case management conference."

[10] Part 27.4(1)
[11] Part 27.4(2)
[12] part 27.5.

This is further confirmation that at the case management conference the judge is required to actively manage the case.

61. The importance of the staging of the case management conference is highlighted by three factors: (a) the comprehensiveness of the rule. In this regard it is clear therefore that the intention of the rule is not to leave the staging of the case management conference to chance but to provide for every eventuality; (b) the emphasis on the maintaining of strict time lines both for the fixing and the staging of the case management conference. Thereby ensuring that the requirement under the CPR of timeliness and efficiency is maintained while ensuring the parties have sufficient notice of the change in status from party driven to judge driven to allow them to take whatever steps may be necessary before the need to obtain permission arises; and (c) the adoption of the ultimate sanction of the automatic striking out of the claim in the event that a case management conference is not fixed.

62. By giving the claimant the final responsibility for ensuring that a case management conference is fixed the rules recognize the role and acknowledge the duty of the claimant, as the prosecutor of the claim, in ensuring the efficient movement of the case through the court system. By establishing a low threshold for the exercise of the discretion to reinstate however the rules also recognize and acknowledge the harshness of the sanction that is to be automatically applied to such a failure.

63. The purpose of the case management conference is therefore not simply to bring the parties before a judge for active case management. The case management conference also has a key role in ensuring the efficient movement of the case through the court

system. The event therefore requires the judge to actively manage the case in the presence of the parties and their attorneys by bringing the parties as close as possible to a resolution of the case or those issues that need not trouble the court. It also requires that, in the event that the case cannot be resolved at that stage, the judge give directions to ensure the efficient and timely movement of the case to the next stage. In addition it signifies to the parties the need to obtain the permission of the judge to take steps for which permission was not necessary earlier.

Was the judge actively managing the case?

64. This question requires a consideration of the requirements of part 25 and the court's duty to actively manage cases. This is not an easy duty. It is a duty however that trial judges are required to undertake in each and every case docketed to that judge. The rule obliges a court, of its own initiative, to make genuine efforts to manage the case by, among other things, actively facilitating a resolution of the whole or a part of the case.

65. By the use of active verbs and linking the duty of the court under this rule to its duty to deal with cases justly the rule requires active case management to be more than a passive facilitation of the settlement of the case. The concept of active case management requires that positive steps be taken towards that goal by the judge.

66. This requirement identifies and emphasizes one of the differences between the dispensation under the old rules[13] and the new. Under the old rules adjournments were the order of the day. Cases meandered towards trial with little or no judicial input. Early judicial intervention was solely for the purpose of resolving interlocutory or interim

[13] Rules and Orders of the Supreme Court 1975

applications. The focus under the old rules was directed exclusively towards resolution by trial. Indeed in the old system the majority of trials that were settled were settled at the door of the trial court. The result was a system overburdened by delays and inefficiency.

67. Under the CPR trial is a last resort. Consequently the court's duty is not simply to manage a case but to actively manage it. By actively managing the case those cases that can be resolved prior to trial are resolved thereby allowing the court's resources to be allotted to those cases that cannot not be settled, that is, those cases that need to go to trial. This requires the CPR judge to purposefully take control of the progress of each case docketed to that judge. By actively managing the case a judge is required to identify and resolve those cases or issues for which a trial is unnecessary using methods which include those actions identified in part 25.

68. Zuckerman in dealing with the differences between the pre-CPR dispensation and the post-CPR dispensation says this:

> "Before the CPR the court was essentially reactive, it merely responded to parties' applications in the course of litigation. Now the court is proactive. It must take the initiative and direct the intensity and pace of the litigation process……A court managing a case must adopt the most appropriate measures for ensuring that a correct outcome is reached in a proportionate and reasonably expeditious manner."[14]

[14] Zuckerman pages 32 and 33 paragraph 174.

69. To determine whether the judge was in fact actively managing the case therefore requires an examination of the facts of this particular case. The action commenced on 23rd December 2015 by way of an application made without notice to the appellants for injunctions. These injunctions were granted to NGC on the same date. One of the injunctions granted was a freezing injunction the effect of which was to restrain SIS from disposing, dealing with or diminishing the value of any of its assets within the jurisdiction up to the value of $180,000,000.00.

70. The judge's first interaction with the case was at the stage of the applications to continue and discharge the injunctions. These applications were dealt with over a period of three days. During the course of the hearing of those applications it was admitted by NGC that the whole purpose of the case was to ensure that these assets were available to it at the completion of a proposed arbitration. Insofar as the claim also requested the setting aside of certain mortgages and a debenture the appellants had, early in the day and certainly by the 22nd February 2016 the date of the filing of the defences, volunteered their willingness to have the mortgages and the debenture released.

71. The issues for determination at trial were therefore very narrow and basically the same as those ventilated in the submissions by the parties on the applications heard by the judge. Once the judge determined the fate of the injunctions there was not much more in the case.

72. Further it was clear that the issues raised by the action did not in any real respect determine the real issues of dispute between NGC and SIS. These were issues that, in accordance with the contract between NGC and SIS, required a determination by

arbitration and therefore could not have been determined by the judge. In addition, given the willingness of RFR to release the mortgages and debenture there was no real area of dispute between NGC and RFR. So that, insofar as the parties were concerned, once the judge determined the applications before her they had no real interest in a trial of the action except perhaps insofar as costs were concerned. This was particularly so since the order sought by NGC was to have these injunctions continued until the determination of the arbitration.

73. The first time that the parties and the judge met after the filing of the statement of case and the defences was on 10th June 2016. At that time the judge gave her decision on the applications, continued the freezing injunction until the determination of the arbitration and gave directions for the further conduct of the case. By her order made on that date it was clear that the action was on the trial track. Further by fixing the case management conference for February 2017 and not fixing a trial date it was obvious that the trial would not be heard with any urgency.

74. According to the judge: "It had always been my intention as was my practice to give directions for the progress of the matter as well as deliver the Ruling on the Application." The logical, and indeed the only, inference to draw from this is that the judge's original intention was that the type of orders made on 10th June would have been made on 8th March had the applications for adjournments not been made. Of note however is the fact that the transcripts for 10th June do not reveal any discussion on the issues raised in the statement of case or the defences or, more importantly, any discussion on whether this was an appropriate case to take to trial.

75. The judge's position was that she was engaged in the active management of the case before the filing of the defences. The transcripts of the hearings on 6th,7th and 8th of January do not reveal any attempt by the judge to manage the case. At that stage it is clear the judge was merely engaged in hearing the applications. Given the requirements of active management therefore this does not seem to be a situation where the judge was actively managing the case before the defences were filed.

76. Thereafter all that was done by the judge was to adjourn 'the matter' at the behest of the parties with the intention of delivering her decision on the applications and giving directions and subsequently give directions the effect of which was to put the trial for a date sometime after February 2017. Against this background can it really be said that, by adjourning the matter on two occasions without a hearing at the request of the parties for a period of over three months and giving directions which had the effect of taking the case towards trial which, at the earliest, could not have been heard before February 2017, the judge was actively managing the case in the manner required by the CPR and in particular Part 25.

77. According to the judge she granted the adjournments requested by the parties pursuant to her case management powers under CPR 25.1 (c) to (e). The rules relied on by the judge required her to actively manage the case by: "(c) encouraging the parties to use the most appropriate form of dispute resolution including, in particular, mediation, if the court considers that appropriate and facilitating the parties' use of such procedures; (d) encouraging the parties to co-operate with each other in the conduct of the proceedings; and (e) actively encouraging and assisting the parties to settle the whole or part of their case on terms that are fair to each party."

78. There is nothing in the transcripts of what occurred prior to the adjournments or in the emails passing between the JSO and the parties that suggest that the judge took any of these actions. Neither do the reasons of the judge assist in this regard. Insofar as the judge was engaged in managing the case therefore it is clear that after the defences were filed all that was being done was to facilitate settlement discussions by adjourning the matter to allow the parties time to engage in these discussions.

79. In the light of the actions identified in part 25.1 it is difficult, if not impossible, to classify the steps taken by the judge as active case management by the judge. This is particularly so when one considers that, given the nature of the case, most, if not all, of the issues had already been ventilated before the judge by 8th January 2016 and all that was outstanding was her decision on whether or not the injunctions granted on 23rd December 2015 ought to continue until the arbitration or be discharged. Once the judge gave that decision there was in essence nothing else to be determined by her except perhaps whether the mortgages and debentures ought to be released, a position that was not opposed by the appellants, and costs.

80. In these circumstances it cannot be said that the judge was actively managing the case in the manner contemplated by part 25 or the overriding objective. The active management of the case would have included: (i) early identification by the judge of the issues for determination; (ii) facilitating an active consideration of those issues by the parties by having those issues placed on the table for discussion, drawing to the parties' attention the fact that this was a simple case of establishing a holding position pending arbitration, that in those circumstances if NGC had established that the injunctions granted should be continued there may have been no need for a trial,

conversely if the injunctions had been improperly granted and discharged, given the appellants willingness to have the mortgages and debenture released, there may have been no need for trial; (iii) thereafter, if necessary, encouraging the parties to engage in appropriate settlement discussions; and (iv) if it became apparent that there were issues that needed to go to trial "giving directions to ensure that the trial of the case proceeded quickly and efficiently"[15].

81. In taking this approach the court would have been proactive; have taken the initiative and directed the intensity and pace of the litigation process. This would have been in accord with the objective of case management and the overriding objective. The judge would have identified an outcome or a way forward which would have saved expense; dealt with the case in a manner that was proportionate to the complexity of the issues; dealt with it expeditiously and, taking into consideration the need to allot the court's resources to other cases, have allotted to the case an appropriate share of the court's resources and, more likely than not, taken the case out of the system.

Are the circumstances that apply in this case within the contemplation of the rule

82. It is not in dispute that the case was not treated in the manner required by part 27.3. None of the steps required by that rule were taken in this case. The court office failed to fix a case management conference. There is no suggestion by the judge that she dispensed with the case management conference. Nor was the case management conference fixed within 14 days of the filing of the last defence, by 8th March, 2016, as required by part 27.3 (3). Indeed this is confirmed by her order of 10th June when she

[15] Part 25.1(l)

fixed ‘the case management conference’ for the 14th February 2017. And, except by way of the notice of application dated the 7th June that was withdrawn, NGC did not apply for a date to be fixed for the case management conference.

83. In answering the question of whether the rule applies in the circumstances of this case the question really is whether part 27.3 contemplates a situation where the parties are before the docketed judge prior to the step which would, in accordance with the general rule, trigger the fixing of a case management conference. The answer to this question lies in part 27.3 (3).

84. Part 27.3 (3) contemplates a situation that is outside the general rule. It specifically provides for a situation where a judge has the conduct of the case before the general rule is triggered by the filing of the defence. Fixed date claims apart, under the CPR, this may occur in three situations: pursuant to part 13, where a judgment in default of defence has been obtained and has been set aside; pursuant to part 17 where a party has applied for an interim remedy prior to the filing of the defence and pursuant to part 74 in an admiralty claim where there is a claim in rem and a warrant for an arrest of the ship is issued.

85. Both part 13.6 and part 74.27 allow the judge in certain circumstances to treat a hearing as a case management conference. By part 13.6 upon setting aside a default judgment the judge must treat the hearing as a case management conference unless it is not possible to deal with the matter justly at that time. If, in the judge’s discretion, the hearing ought not to be treated as a case management conference then the court office must fix a date, time and place for a case management conference. This rule therefore

underlines the need for a case management conference but gives to the judge the discretion to treat a hearing, initially for another purpose, as a case management conference. Since it in reality provides for a case management conference it therefore renders the operation of 27.3(3) unnecessary.

86. Part 74.27 deals with the case management conference and provides that, subject to slight differences, parts 25 to 27 shall apply to admiralty claims. The rule also provides that in certain limited circumstances the judge must treat a hearing as a case management conference[16]. In those limited circumstances only therefore, like part 13.6, part 74.27 renders the operation of part 27.3(3) unnecessary.

87. The last situation contemplated by the rules is where, as in this case, the claimant has applied for an interim remedy pursuant to part 17 prior to the filing of the defence. Part 17.7 provides that on the hearing of any application under this part: "the court may exercise any of its case management powers under parts 26 and 27 and may in particular give directions for an early trial of the claim or any part of the claim." Unlike Part 13.6 and 74.27(1) (b) the rule does not provide for the judge to treat a particular hearing as a case management conference but rather empowers the court to exercise its case management powers under parts 26 and 27 and provides that the court may, in particular, give directions for an early hearing of the claim or part of the claim.

88. In these circumstances therefore, unlike parts 13.6 and 74.27 (1)(b), part 17.7 does not oust the obligations of part 27.3(3). The fact that part 17.7 provides that on the hearing of any application under that part the court may exercise any of its case management

[16] Part 74.27(1)(b)

powers under parts 26 and 27 does not obviate the need for compliance with part 27.3 by either holding a case management conference or dispensing with it in accordance with part 27.3(3)(a).

89. In her reasons after referring to part 17.7 the judge says:

> "It is to be noted that the exercise of the case management function under this rule is not limited to giving directions for an early trial of the claim. As I noted before on the date fixed for the delivery of the decision I intended to give directions for the continuation of the matter thereby exercising the court's case management powers."

90. Insofar as the judge identifies that the rule was not limited to giving directions for an early trial she was of course correct. The judge's error was assuming that her exercise of case management powers somehow equated to the holding of a case management conference. Where she may also have fallen into error is assuming that part 17.7 permitted her to treat the hearing before her as a case management conference. Of course it may be that in some circumstances a judge may make an order for early trial and, in doing so, in fact dispense with the requirement of case management conference without actually saying so. In such a case however the circumstances or parameters set out in part 27.4 must apply.

91. These circumstances did not apply in this case. In any event, by actually fixing the case management conference for 14th February 2017 it is clear that it could not have been the judge's intention to treat the hearing as a case management conference or dispense with a case management conference despite her exercise of case management powers or, more accurately, despite her giving directions for the further conduct of the case.

92. What is clear however is that part 27.3(3) deals specifically with a situation where the general rule does not apply because, as in this case, the parties may already be before the docketed judge prior to the event which, in the usual circumstances, will trigger the fixing of a case management conference. In those circumstances it falls to the judge to fix or dispense with a case management conference or if that does not occur for the claimant to apply for one to be fixed.

93. In circumstances such as this therefore where the rule specifically provides for what is to occur in a particular situation it is not open to a court, as unfair as the application of the rule may be on the facts of the specific case, to justify the non-application of the rule by adopting the mechanism of a purposive interpretation. To do so would be treating that action in a manner that is not in accordance with the CPR and creating a situation where the exercise of a judge's discretion is unpredictable and arbitrary.

94. This is particularly egregious where, as in this case, no discretion is given to a judge by the rule. By providing that the claim be automatically struck out a judge is not empowered by the rules, or even the overriding objective, to exercise a power or even a discretion in this regard. The only discretion open to the judge is in the judge's exercise of the power to reinstate given by part 27.3(5) and (6).

Conclusion

95. Insofar as the question, do the provisions of part 27.3 apply to the circumstances of this case, requires us to answer the three questions posed earlier in this judgment therefore the answers are as follows:

(i) the purpose of part 27 is not simply to bring the parties before a judge for active case management but also to establish an event known as the case management conference the role of which is essential in the operation of the CPR. It ensures the efficient movement of each case through the system in accordance with the principles of case flow management adopted by the CPR. It sets the stage for active case management of the case in the presence of all the stakeholders to the litigation. And, finally, it marks the time when the judge takes control of the litigation and thereafter the parties are required to obtain permission of the judge to take certain actions;

(ii) insofar as the judge did not adopt or seek to adopt "the most appropriate measures for ensuring that a correct outcome is reached in a proportionate and reasonably expeditious manner" the judge was not engaged in active case management within the context of the requirements of part 25 and the overriding objective either before or after the filing of the defences in the action; and

(iii) in any event by specifically empowering a judge to either dispense with a case management conference or to fix such a conference part 27.3 (3) specifically deals with the situation where the parties are before the judge prior to the date when a case management conference would have, in accordance with the general rule, been fixed by the court office.

The particular situation that arose in this case therefore was within the contemplation of the rule.

96. For NGC to submit therefore that "it could not have been the intention of the rule makers that a claim would be automatically struck out because a piece of paper stating that a case management conference was fixed was not issued by the court office in circumstances where the claim had been docketed to a judge who was actively managing the same, had part heard applications before her and had fixed dates for the delivery of decisions in respect of those applications and for the issue of directions for the further progress of the claim" is not to appreciate the role of the case management conference in the context of the CPR or the process of active case management required under the CPR.

97. The rule therefore applies to the circumstances of this case. In the circumstances, the case management conference not having been fixed by the court office or the judge within the timelines given by part 27.3 or not having been dispensed with in accordance with 27.3(3)(a), NGC was required by part 27.3(3) to apply within 28 days of the filing of the defences to have the case management conference fixed despite the fact that the case was engaging the attention of the judge. That not having been done the case was in accordance with part 27.3(4) automatically dismissed. This dismissal was by virtue of the rule and not through any action of any of the appellants or exercise of any powers or discretion by the judge.

98. By our calculations in accordance with the rule the action was automatically dismissed on 4th April 2016 and NGC had until 23rd May 2016 to seek relief from the sanction imposed by the rule. This however would have been without prejudice to the power of the judge, in an appropriate case, to extend the time for making such an application pursuant to part 26.1 (d).

99. In our view had NGC pursued its application to reinstate the action the fact that the parties had been engaged in settlement discussions instigated by SIS, while not relevant to the issues on this appeal, would have been germane and relevant to answer any question of prejudice that may have been raised by SIS and RFR. Unfortunately as the matter transpired the judge granted NGC permission to withdraw the application and it is not before us.

100. In the circumstances therefore this appeal is allowed and the decision of the trial judge set aside. The claim is struck out pursuant to part 27.3(4) of the CPR and the action referred back to the trial judge for the hearing of an inquiry as to damages pursuant to the undertakings given by NGC on the granting of the injunctions and for the assessment of costs.

Judith Jones
Justice of Appeal