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

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

Dissenting judgment delivered by Peter A. Rajkumar JA

General Background

1. These proceedings arise out of a contract for the construction of a Water Recycling Plant at Beetham (the contract) in the amount of approximately US $ 162 million. Each party alleges breach thereof by the other. The contract provides for those issues to be determined by arbitration. On December 23rd 2015 the claimant, (the respondent to this appeal) – instituted proceedings against the defendants/ appellants seeking, inter alia, a freezing order/injunction to restrain dissipation of assets by the first defendant to the value of TT $180 million dollars and an order that four mortgages and a debenture entered into between the first and second named defendants be set aside.

Procedural history

2. The procedural history of this matter needs to be set out as so much turns upon it.

Hearings

i. On December 23rd 2015 an ex parte order was granted by the emergency judge under which, inter alia, assets of the first defendant were effectively frozen up to the value of TT 180 million.

ii. That order was continued with a minor variation on December 29th 2015 by another judge (also sitting in vacation court), who then adjourned the matter to be heard by the docketed judge, ("the Judge" or "the docketed Judge").

iii. On January 6th, January 7th and January 8th 2016 the application for the continuation of the injunction, and a corresponding application by the First named defendant to discharge the injunction, were heard by the docketed judge.

iv. Judgment on the application was reserved, with the injunction to continue, and by order dated January 8th 2016 the docketed judge adjourned **the matter** to February 29th 2016.

3. In the interim, after that hearing of the matter, pleadings were filed as follows:-

Filings

a. The claimant's statement of case was filed on January 25th 2016.

b. The defence of the first defendant was filed on February 22nd 2016.

c. The defence of the second defendant was filed on February 22nd 2016.

Adjournments

4. On February 24th 2016 a notification was issued to the parties indicating that the matter listed for February 29th was rescheduled to March 8th 2016.

5. On March 7th 2016 the claimant / respondent via its instructing attorneys then wrote to the court communicating a joint request by the claimant and first defendant, with no objection by the second defendant, for an adjournment of the hearing listed for March 9th 2016 because the parties were engaged in without prejudice discussions. As a result of that request the court adjourned the matter, which had been **fixed for hearing on** March 9th 2016, to May 18th 2016

with the injunction to continue to that date. It communicated this via e mail from its Assistant Judicial Support Officer.

6. A further request was made by joint letter from the (claimant / respondent and the first defendant) for a further adjournment, and as a result, the date of May 18th 2016 was vacated and by notice dated May 19th 2016 the *matter* was adjourned to June 21st 2016.

7. By letter dated June 6th 2016 the first defendant communicated to the court in effect that discussions had not been productive and sought to notify the court that the action was automatically struck out pursuant to CPR Part 27 (2) as at **22nd March 2016**.

8. The appellants indicated in that letter dated June 6th 2016 that the four mortgages, the subject of the action, had been released and contended that in those circumstances:

a. that the action was automatically struck out on March 22nd 2016 and;

b. impliedly, that the orders made, including those on the injunctions/ freezing orders, ceased to apply as there was no longer any substantive matter in existence, necessitating an inquiry as to damages based on the undertaking in damages by NGC..

Decision and directions

9. In those circumstances the court brought forward the hearing and delivered its judgment on June 10th 2016 and gave **further directions**.

10. The appellants contend that in those circumstances;

i. the court office, having failed to fix a date for a case management conference, and

ii. the court not having given notice of one within 14 days after the filing of the defences on February 22nd, 2016, and

iii. the claimant / respondent not having **applied** within 28 days of the service of the defences for a **date to be fixed** for a case management conference,

that under CPR Part 27 (3) the entire matter was, as a consequence, automatically struck out. The claimant had not made an application within 3 months from the date of service of the defence for relief from that sanction.

Written reasons

11. This contention was rejected by the docketed judge, who indicated, in written reasons: -

a. That it had been intended to deliver the ruling on March 8th 2016 as well as to give directions for the progress of the matter [paragraph 26, 28 reasons].

b. That when **the matter** had been adjourned on March 7th she had contemplated that the entire matter was being adjourned, which included **both** the applications (for continuation of the injunction and discharge of the injunction) **and** the entire claim, on which she had intended to give directions on March 8th 2016.

c. That in those circumstances it was not necessary that a date for a Case Management Conference be requested since the rule was not meant to come into effect when the court had been actively managing the case before the defence was filed.

Given therefore that she could, and would, have given directions for case management, the listed date for hearing of the matter on March 10th 2016 was in effect a date at which case management conference powers would have been exercised as in fact they were

even as early as March 7th 2016 when the hearing date listed for March 8th 2016 was adjourned by the Court. That date was put off from time to time at the request of the parties until eventually on June 10th 2016 [to which date the June 21st hearing was brought forward] the decision on the applications for interim relief were determined, **and**, (as originally intended to be done at the vacated hearing of March 8th 2015), directions were given for further case management.

12. It must also be noted that the order of June 10th 2016, in which directions are given for inter alia, filing and service of a reply, standard disclosure and inspection of documents, filing of agreed facts and statements of issues, agreed bundles and witness statements, contains a direction that "**The** case management conference is fixed for 14th February 2017.

The appeal

13. The appellants are appealing the decision of the trial judge rejecting their contentions that the entire matter was automatically struck out as a result inter alia, of the failure of the claimant to request a date for case management, or the Court office to fix one.

Issues

14. This appeal raises issues as to the applicability and construction of CPR Part 27 (3) as set out hereunder.

a. Whether CPR 27(3) is applicable at all in the specific circumstances of this case as set out above such as to require a claimant who has an application for interim relief pending before a docketed judge, with existing dates for further hearing in that application, to

make a specific further application for a Case Management Conference under CPR 27 (3).

b. If CPR 27(3) is applicable should it receive a strict and literal interpretation, or would a purposive construction be appropriate.

c. If CPR 27 (3) is applicable does its construction, in the specific circumstances of this case, result in the entire proceedings being **automatically** struck out, including the orders on the applications for interim relief.

d. What is the effect of the court's order on June 10th 2015 where it was stated that "T**he Case Management Conference is fixed for February 14th 2017".**

e. Whether the time frame of 3 months stipulated in CPR Part 27(3) (5) is mandatory or is it amenable to further discretionary extension.

Conclusion

15. a**.** CPR Part 27(3) 1, specifying as it does, that the **general** rule is that the **court office** shall fix a Case Management Conference immediatey upon the filing of a defence … and Part 27 ((3)(3) (b), that if the **court** does not give notice of a Case Management Conference (within the specified period), the **claimant** shall (within a specified period) apply for a date to be fixed for **the** Case Management Conference, **do not apply** where, as here:

i. The application for interim relief was **already** engaging the attention of the docketed trial judge, who had overall conduct of the **entire** proceedings, **and**

ii. A date for further hearing had **already** been set, (in this case within 14 days after the filing of the defences,) **and**

iii. The date for further hearing was one at which case management directions of the entire matter could have been, and were clearly intended to have been given.

In those circumstances and in that context, the rule, intended, as it clearly is, to ensure that a matter proceeds to Case Management Conference after the filing of the defence, rather than slip into judicial limbo because of failure to progress it, would have no application.

In those circumstances a date at which there is an opportunity for case management already exists. It matters not that it is then adjourned to a later date, at the request of the parties, to facilitate discussions in the exercise of the court's powers to do so under CPR Part 27 (8) (2)a.

b. **Alternatively**, even if CPR 27(3) does apply, it must be interpreted **purposively**, as the contended strict literal interpretation would produce the absurd result that a matter initiated before a judge seeking interim relief, having engaged the court's attention and with a decision about to be delivered, on a date after the defences have been filed, could yet stand automatically struck out 42 days after the filing of the last defence, rendering otiose any decision given by the judge. In fact such an absurd result would occur in this very case. The purpose of CPR 27 (3) is to ensure that a **date** for management conference is fixed. It may be fixed by the court office or the court may give notice of a CMC within 14 days after the filing of the defences, or if neither of these has taken place, the claimant must within 28 days of the expiration of the relevant period , apply for a **date** for a CMC

to be fixed. Once a **date** already exists before the docketed judge at which case management directions could be given, the necessity for still requesting such a date is not apparent, far less the draconian consequence of not doing so – the automatic striking out of the entire claim. There is nothing in the rule itself, read in the context of the CPR, which would lead to such an illogical and perverse result, especially where such an interpretation would revive the outdated philosophy of trial by ambush.

16. If either:-

i. the order of the Judge at the conclusion of arguments on the applications for continuation and discharge respectively of the injunctions, adjourning **the matter** to February 29th 2016, or

ii. the notices of February 24th 2016 listing the **"matter**" for March 8th 2016, or

iii. the notice of March 7th 2016 adjourning the **subject matter** to May18th 2016

had simply contained the additional words "and case management conference "or equivalent so as to read, for example, in the case of the notice of March 7th 2016 "the *subject matter* ***and the case management conference*** *now stand adjourned to 18th May 2016*", there could be no debate as to whether the court had given notice of a CMC, obviating the necessity for the claimant to apply for a date to be fixed for one.

17. It is undisputed that the order and notices did not include those words. However even without their inclusion it is indisputable that the court could have given case management directions, as in fact it eventually did on the final adjourned date of June 10th 2016.

18. The appellants cannot contend that they were prejudiced by the absence of a date being fixed **expressly** for a case management conference, caused by the Claimant's failure to apply for one within 28 days of the relevant period, when the court had already indicated such a date at which it was open to it to give case management directions.

19. To contend that there is some critical distinction between a date at which case management directions can be given, and a case management conference, carries the matter no further where, as here, the directions that the Judge eventually gave at the adjourned hearing date were for all intents and purposes no different from those that would be given at a case management conference as contemplated by CPR Part 27 (6). According to the Judge these were the directions that were intended to have been given on February 29th and then on March 8th 2016.

20. The rule -27(3) (6), itself provides that where a case management conference date has not been set and the claimant has failed to apply for one within 28 days after the expiration of the relevant period, that on an application for relief, (to reinstate) within 3 months, the **only** consideration on the application of the discretion to relieve from the sanction of automatic striking out, is the issue of what prejudice the defendant/s have suffered. The rule contemplates, as the purpose of its application, the avoidance of prejudice to a defendant who had been subjected to litigation by a claimant who then fails to progress the action against it.

21. This cannot be said to be the case here. The case management conference date contemplated by the rule already existed. A request by the claimant for a date to be fixed for a case management conference at any time before April 4th 2016 could reasonably have, in the

circumstances referred to above, and in the reasons of the judge, been met by a response that a date had already been set- February 29th, and then March 8th 2016. It would make no difference that the initial date had been set before the defences had been filed. The trial judge was fully entitled to manage the case, including both the applications then before here, and the entire matter, if that could be done by the adjourned date.

22. The rule must therefore be interpreted as requiring an application for a case management conference **if a date does not already exist at which directions for case management can be given.**

23. **Disposition**

For the reasons summarized above and elaborated upon below I would have dismissed the appeal with costs to be paid by the Appellants/ defendants to the Respondent /claimant.

Analysis and Reasoning

24. CPR 27 (3) provides as follows: (all emphasis added)

> ***Case management conference***
>
> ***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) a****pply 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.

25. If CPR 27 (3) does apply in the circumstances of this case, it would require an acceptance of the argument of the appellants that while the docketed judge was seized of the applications for interim relief, the court was not, without Part 27 (3) having been expressly triggered/ invoked by the court office, the court itself, or the claimant, sufficiently seized of the substantive matter as to be able to treat the hearing set for March 10th 2016 as a case management conference, despite the clear indication by the judge that that was what was intended on that date.

26. It would require an acceptance of the unsubstantiated proposition that a matter before a docketed Judge must be deemed to proceed on two separate parallel tracks, without the practical possibility of those tracks converging, by the judge giving decision on an application for interim relief and at the same time giving directions for further Case Management, in effect treating that hearing as a Case Management Conference (CMC).

27. It would require acceptance of the proposition that a court can only treat a hearing of a matter on a date for granting interim relief as a Case Management Conference where, as for example at CPR Part 13 (6), the rules expressly permit and in fact so require that. But that is not a construction that CPR 13 (6) can legitimately bear on its plain and literal meaning. That rule cannot be construed as meaning only that where a rule expressly provides for a hearing to be treated as a CMC can it be so treated.

28. It would require acceptance of the further unsubstantiated proposition that CPR 17 (7) does not permit a court to treat a date for hearing of an application under Part 17, and in particular the date for decision on an application for interim relief under that Part, as a date at which it can also give directions for case management and /or treat that date as a case management conference date.

29. But that is not a construction that CPR 17 (7) can legitimately bear on its plain and literal meaning.

Part 17(7)

> ***Power of court to order early trial, etc.***
>
> ***17.7*** *On hearing 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.*

30. The exercise of any of its case management powers under Part 17 (7) must necessarily include the jurisdiction to exercise all of its case management powers. See for example CPR Part 25 1(i) & (l), and CPR Part 26 (1) (w).

31. If a court exercises such powers, as it is entitled to do by the language of that rule it must necessarily be entitled to treat that hearing as a case management conference if it so chooses. Any contention to the contrary would ignore the structure of the CPR which allows a judge to give all directions necessary to manage a case at any time. From a reading of, for example CPR 25 – case management – the objectives, the Civil Proceedings Rules are intended to provide flexibility in the management of cases, and recognize the discretion and jurisdiction of the trial judge to manage cases appropriately, for example 25 (1) (l). Any contention therefore that the docketed judge cannot treat a date for decision on an application for interim relief as also being a case management conference finds no support in the Civil Proceedings Rules.

32. If the docketed trial judge had not been prevailed upon to adjourn the hearing on March 10th 2016 and had been left to deliver judgment and directions as she indicated she intended to do, this issue would not have arisen.

33. The hearing of March 8th 2016 was within 15 days after the filing of the defence. The date for that hearing was fixed on February 24th 2016, 2 days after the filing of the defences. If the court had given directions for case management on that day, the appellants would only have been able to contend instead that those directions were not given at a Case Management Conference as neither a party nor the court office had **specifically** requested a date for a case

management conference, or that 4 weeks had not yet elapsed after the defences had been filed (even though the matter was quite arguably urgent). If it had done so then it would have been open to claimant to have made an application, out of an abundance of caution, to have a date for Case Management Conference fixed, and even for the date of hearing itself – March 8th or shortly thereafter, to have been treated as such a CMC.

34. No time limit would have yet expired and it would not have been even arguable that as at that date the claim had been automatically struck out.

35. What has changed is that after aborted discussions, which had the effect of deferring the judge's decision, more than 3 months have elapsed since the service of the Defendants' defences. It is this delay, participated in by the appellants, which enables the argument that CPR 27 (3) (3) is applicable, and further, if given a strict literal construction, the argument that the entire claim has been automatically struck out.

Consequence of CPR 27(3) not being construed literally

36. The argument has been raised that the rule is mandatory, as without that specific notice of a CMC contemplated by Part 27(3) the parties would not be in a position to know at what point the first case management conference has been concluded so as to guide them with respect to applications for changes to the statement of case ,(CPR Part 20(1) (3)), applications for budgeted costs (CPR Part 67(8)(2), ancillary claims -(CPR Part 18 (4) (5)and applications for addition of parties (CPR Part 19 (2) (7), to name a few examples.

37. However, the date at which the first case management conference is concluded is a different issue from the need to ensure that a date for a case management conference has been **fixed**. CPR Part 27 (3) does not relate to the date at which the first case management conference is concluded. CPR Part 27 (3) simply addresses the need for a date for one to be fixed, whether triggered by the court office, the court itself, or, in default, triggered by an application by the Claimant.

38. Whether or not therefore the first case management has been concluded is a separate matter from whether a date fixed for hearing can be regarded as a date fixed for a case management conference.

39. There is absolutely nothing in the factual chronology set out above that even remotely resembles a laissez faire approach to litigation, far less any conduct that requires an interpretation of CPR Part 27 (3) that results in the extreme, draconian and wholly disproportionate consequence of the entire claim being deemed to be automatically struck out, instantly, suddenly and without warning, depriving the judge of all jurisdiction, with the evaporation of any interim relief obtained by a party.

40. In the case where a docketed judge of the High Court, being seized of the entire claim, and expressly mandated by the CPR to manage the claim , with powers to do so being conferred in the widest possible terms –

a. Has the **jurisdiction** to give all necessary directions on the **date** it delivers judgment on an application for interim relief as it can exercise any of its case management

powers under Parts 26 and 27 including therefore making under Part 27 (6) orders that can be made at a Case Management Conference;

b. Has indicated **expressly** in reasons that it was **intended** to **exercise** that jurisdiction to deliver the judgment and give those directions on that date, which was fixed for hearing well within 42 days of the service of the last defence;

c. **Actually exercises** such jurisdiction, on the **date** to which the **matter** has been **eventually adjourned** at **the request of the parties**, in both **delivering the judgment** and **giving those directions**;

it simply cannot be contended that the omission of the Claimant to itself, separately apply for a date to be fixed for a CMC, could conceivably have the result that the entire claim is automatically struck out.

41. In so far as it may be suggested that there is some significance in the distinction between case management directions and a case management conference in this case, given:

i. that the court could have exercised **any** of its case management powers under Parts 26 and 27 including therefore making **orders** under Part 27 (6)- orders that can be made at a Case Management Conference;

ii. that nothing in the CPR precludes a court from making **all** the orders on that date that it could have made at a case management conference, whether or not expressly so described, and

iii. that the court therefore had the **jurisdiction** to give **all** necessary directions on the **date** it delivered judgment on the application for interim relief, such a distinction would clearly make no practical difference

42. It is clear therefore that when the CPR is examined in context there is no support for any argument that, without an **express request** for a case management conference before a judge, that a date for that matter, (in this case coming up within 15 days of the filing of the defences), cannot be treated by the judge as a case management conference, or that the Court cannot give such directions thereat as it considers appropriate. In this case the learned trial judge did give substantial directions no different from those that could be given at a case management conference if expressly described as such, as contemplated by CPR Part 27,

43. Further, in those circumstances, where such directions were given it would be appropriate to consider what the court actually did, rather than attribute excessive significance to the words in the order of June 10th 2016 "***The*** *case management conference is adjourned to February 2017"*. It is clear that the directions given on June 10th were given at a conference at which the parties attended. It is clear also that it cannot be contended that at that conference the judge failed to give the majority of the directions that would be given at a case management conference.

44. There is no reason whatsoever therefore to consider that hearing / conference in substance, anything other than a case management conference.

45. The judge has said so in the written reasons and this is consistent with the actual procedural history of the matter. It is also clear that this is what the judge intended to do on March 8th 2016 and what she would have done, had it not been for the joint request of the parties for an adjournment pending discussions. (See paragraphs 26 and 28 of the written reasons for decision). The judge's reasons must be considered and accorded appropriate respect by the court of Appeal. This is recognized by settled practice – see ***Tysa Company Limited v Guardian General Insurance Ltd HCA 4349 of 2009*** and ***Tota Maharaj v Auto Centre Limited and Ors HCA 46 of 2003.***

Whether the time limit of 3 months for an application for reinstatement is mandatory

46. The CPR itself contemplates by rule 26 (1) (d) that all time periods for compliance with any rule can be extended.

> ***26.1*** *(1) The court (including where appropriate the court of Appeal)*
>
> *may—*
>
> *(d) extend or shorten the time for compliance with any rule, practice direction or order or direction of the court;*

47. CPR 27 (3) itself provides that the only consideration on an application for extension is whether the defendant has suffered any prejudice.

48. The arguments concerning automatic striking out on the part of the appellants appear to proceed on the basis that once a matter stands struck out then it remains so with no residual discretion in the Court to grant relief from that result. But it needs to at least be considered,

though not conclusively decided in this appeal, whether a defendant can sustain a claim to have suffered prejudice, in circumstances where a defendant itself participates in that 3 month period expiring as a result of its representation, or joinder in a representation, to a court that it is involved in discussions, and expressly participates in requests to the court to adjourn a date fixed for decision.

Why would the time not be amenable to extension?

a. Though the rule provides its own time frame the CPR Part 26 (1) (d) expressly recognizes jurisdiction of the Court to extend times stipulated in the CPR
b. Although before that 3 month period within which the Claimant may apply for relief the matter would have been automatically struck out 42 days after the service of the last Defence, the rule itself recognizes the discretion of a court to resuscitate the matter, even though struck out, within the 3 month period. Clearly therefore
    i. if that discretion can exist **within** a 3 month period **after** the matter has been automatically struck out, **and**
    ii. time limits stipulated in rules can be extended,

then this time limit of three months, within which the claimant can apply for relief from that sanction, can equally be extended if the court in its discretion can be so persuaded.

The adjournments

49. The trial judge is enjoined by CPR part 27 (8) (2) to facilitate discussions between parties. The judge cannot be faulted for adjourning the hearing on March 8th 2016 at the request of the parties for this purpose. It is surprising therefore that the expiration of time frames within

this period requested by the parties could in effect be the subject of challenge to the judge's jurisdiction to continue with the matter and give directions more than 3 months after the filing of the defences, when the reason that 3 months were even allowed to elapse was the appellant's participation in a request for adjournments.

Conclusion

50. a**.** CPR Part 27(3) 1, specifying as it does, that the **general** rule is that the **court office** shall fix a Case Management Conference immediately upon the filing of a defence … and Part 27 ((3)(3) (b), that if the **court** does not give notice of a Case Management Conference (within the specified period) , the **claimant** shall (within a specified period) apply for a date to be fixed for **the** Case Management Conference, **do not apply** where, as here:

i. The application for interim relief was **already** engaging the attention of the docketed trial judge, who had overall conduct of the **entire** proceedings, **and**

ii. A date for further hearing had **already** been set, (in this case within 14 days after the filing of the defences,) **and**

iii. The date for further hearing was one at which case management directions of the entire matter could have been, and were clearly intended to have been given,

In those circumstances and in that context, the rule, intended, as it clearly is, to ensure that a matter proceeds to Case Management Conference after the filing of the defence, rather than slip into judicial limbo because of failure to progress it, would have no application.

In those circumstances a date at which there is an opportunity for case management already exists. It matters not that it is then adjourned to a later date, at the request of the parties, to facilitate discussions in the exercise of the court's powers to do so under CPR Part 27 (8) (2)a

51. **Alternatively**, even if CPR 27(3) does apply, it must be interpreted **purposively**, as the contended strict literal interpretation would produce the absurd result that a matter initiated before a judge seeking interim relief, having engaged the court's attention and with a decision about to be delivered, on a date after the defences have been filed, could yet stand automatically struck out 42 days after the filing of the last defence, rendering otiose any decision given by the judge. In fact such an absurd result would occur in this very case. The purpose of CPR 27 (3) is to ensure that a **date** for management conference is fixed. It may be fixed by the court office or the court may give notice of a CMC within 14 days after the filing of the defences, or if neither of these has taken place, the claimant must within 28 days of the expiration of the relevant period, apply for a **date** for a CMC to be fixed. Once a **date** already exists before the docketed judge at which case management directions could be given, the necessity for still requesting such a date is not apparent, far less the draconian consequence of not doing so – the automatic striking out of the entire claim. There is nothing in the rule itself, read in the context of the CPR, which would lead to such an illogical and perverse result, especially where such an interpretation would revive the outdated philosophy of trial by ambush.

Disposition

52. For the reasons summarized above I would have dismissed the appeal with costs to be paid by the Appellants/ defendants to the Respondent /claimant.

Dated the 23rd of November 2016.

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Peter A. Rajkumar

Justice of Appeal