Trinity Term
[2018] UKPC 17
Privy Council Appeal No 0049 of 2017

JUDGMENT

Super Industrial Services Ltd and another (Respondents) *v* National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Carnwath
Lord Hughes
Lady Black
Lord Briggs

JUDGMENT GIVEN ON

16 July 2018

Heard on 26 March 2018

Appellant
Michael Brindle QC
Rupert Allen
Jason Mootoo
(Instructed by Signature Litigation LLP)

1st Respondent
Peter Knox QC
Robert Strang

(Instructed by Bircham Dyson Bell LLP)

2nd Respondent
Ramesh L Maharaj SC
Tom Poole
(Instructed by Sheridans)

LORD BRIGGS:

1. The Civil Proceedings Rules ("CPR") of Trinidad & Tobago now make provision for the automatic striking out of claims where the claimant has (when required by the Rules) failed to apply to the court for a date to be fixed for the case management conference ("CMC"). The main question on this appeal is whether that provision for automatic striking out applies in circumstances where, in interim proceedings, a judge either has already carried out some active case management, or has set a hearing date at which the judge is likely to do so in the near future. In the present case, the docketed judge decided that, in those circumstances, the provision for automatic striking out contained in rule 27.3(4) did not apply. A majority of the Court of Appeal decided that it did. The question is of importance in the context of the revolution in civil procedure brought about by the introduction of the CPR in Trinidad & Tobago in 2005. The CPR are very loosely modelled on the Civil Procedure Rules of England and Wales, which came into force in 1999, but it is common ground that, not least because of their numerous departures from the English model, including this very provision, they need to be interpreted as a separate code in their own right, and by reference to the particular context of the need for procedural reform in Trinidad & Tobago.

2. It will be necessary to refer in some detail to a number of provisions within the CPR, but the essential rules which call to be construed on this appeal are as follows:

> "**27.3 Case management conference**
>
> (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 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."

It is to be noted that the word "automatically" was added to rule 27.3(4) by amendment in 2011.

3. By a Claim Form issued on 24 December 2015 the claimant, the National Gas Company of Trinidad & Tobago Ltd ("NGC"), sought declarations and orders setting aside four mortgages and a debenture by the first defendant Super Industrial Services Ltd ("SIS") in favour of the second defendant Rain Forest Resorts Ltd ("RFRL") on the ground that they were transactions in fraud of SIS's creditors, including NGC. The Claim Form also sought a freezing order against SIS up to the value of TT$180m, and an injunction restraining RFRL from dealing with any of the property or assets charged by the mortgages and the debenture.

4. The freezing order was sought in aid of an intended arbitration claim by NGC against SIS arising out of the termination of a contract for the design and construction of a water recycling plant in Trinidad & Tobago. That arbitration was commenced by notice on 5 October 2016, and remains ongoing.

5. On 23 December 2015 NGC applied for and obtained from Seepersad J in the High Court an *ex parte* freezing order against SIS in the full amount sought in the (then draft) Claim Form and an interim injunction against RFRL in the terms sought by the Claim Form, in both cases until the return date of an application notice (issued on the same day) which the judge directed to be returnable on 29 December 2015, before Mohammed J.

6. On 29 December 2015 SIS issued an application to set aside the freezing order, and for an inquiry as to damages. On the same day Mohammed J ordered that the *ex parte* freezing order and injunction should continue until further order and adjourned both interim applications to be heard by the docketed judge, Charles J. She heard both interim applications in full over 6 to 8 January 2016, at the conclusion of which she reserved judgment, but directed that the freezing order and injunction should continue until a further hearing on 29 February 2016.

7. In the meantime NGC filed its Statement of Case on 25 January, and both defendants filed their Defences on 22 February. Meanwhile Charles J further adjourned the interim applications until 8 March 2016.

8. By this time SIS and NGC had begun without prejudice settlement negotiations. They sought, and were granted, successive further adjournments of the interim applications, to which RFRL consented, until 18 May and then 21 June 2016, the latter being granted on 17 May.

9. Neither the court office (under rule 27.3(1)) nor the judge (under rule 27.3(2)) had in the meantime fixed a CMC, nor had the court dispensed with a CMC pursuant to its power to do so under rule 27.4.

10. On 6 June 2016 SIS claimed in correspondence that the claim had been automatically struck out pursuant to rule 27.3 on 22 March 2016, on the ground that NGC had failed to apply for a date to be fixed for a CMC.

11. On the following day NGC made a conditional application for relief from sanctions under rule 27.3(5) and, since the three month time limit for doing so following service of defences had by then expired, sought an extension of time for the making of that application.

12. At a hearing on 10 June Charles J heard argument as to whether the claim had been automatically struck out under rule 27.3 and held, in a reserved judgment delivered on 21 June 2016, that it had not. In her view, she had been exercising CMC powers of case management as early as 7 March, when the matter had been adjourned. She stated that it had always been her intention (in accordance with her usual practice) to give directions for the progress of the matter when handing down her reserved judgment on the interim applications, which she had adjourned to enable the parties to pursue settlement discussions. Accordingly, in her view, the automatic striking out provision in rule 27.3(4) had not been triggered.

13. The judge had, on 10 June, handed down her judgment on the interim applications, pursuant to which she directed that the freezing order and injunction should continue, in the case of the freezing order until the outcome of the arbitration, and in case of the injunction against RFRL, until trial or further order. By a separate order made on the same day Charles J gave directions for service of a Reply, for disclosure and inspection of documents, for the filing of statements of facts and issues, for an agreed bundle and for exchange of witness statements, and she directed that a CMC be fixed for 14 February 2017.

14. Having determined that the claim had not been automatically struck out, Charles J permitted NGC to withdraw its conditional application for relief from sanctions under rule 27.3(5), with no order as to costs, and it was duly withdrawn.

15. The Court of Appeal (Narine, Jones and Rajkumar JJA) heard the defendants' appeal on 19 September 2016. When Narine JA announced their intention to reserve judgment, senior counsel for NGC mentioned the application for relief from sanctions which had been before Charles J, and withdrawn. Counsel invited the Court of Appeal to treat it as before them in the event that the court should conclude that there had been an automatic striking out of the claim. There were observations from the bench to the

effect that the application for relief from sanctions was not before the Court of Appeal, and an indication from counsel that she might raise the matter again once judgment had been delivered.

16. Judgments were handed down by the Court of Appeal on 23 November 2016. Giving the judgment of the majority, Jones JA held that the claim had been automatically struck out. Rajkumar JA, dissenting, would have dismissed the appeal. It does not appear that the question of relief from sanctions was then revisited by the Court of Appeal. Instead, NGC made a fresh application for relief from sanctions, conditional upon the Board not reversing the decision of the Court of Appeal that an automatic striking out had occurred. That application remains adjourned in the High Court.

17. The thrust of the reasoning of the majority in the Court of Appeal was that Part 27 of the CPR sets out a comprehensive procedural code for the convening of a CMC, which performed a key role in ensuring the efficient movement of a case through the court system, under active judicial case management. The sanction of automatic striking out was one which applied to the circumstances of the case, as a matter of construction. The court expressed its regret that the withdrawal of NGC's application for relief from sanctions before Charles J meant that the question of relief was not before the Court of Appeal.

18. Following the lead provided by the dissenting judgment of Rajkumar JA, NGC's case before the Board may be summarised as follows: It cannot have been the intention of the Rules Committee that the draconian sanction of automatic striking out should be activated in a case where, at the time when the claimant might otherwise have applied to fix the date for a CMC, there was a pending interim process, with a date fixed for its conclusion and the probable giving of case management directions, and where the docketed judge had already exercised active case management powers in adjourning the proceedings in order to encourage settlement discussions. Accordingly, on a purposive construction rule 27.3 should be interpreted as not requiring the fixing of a date for a CMC, either by the court office or by the claimant in default, so that no occasion for an automatic striking out would arise under rule 27.3(4).

19. Mr Michael Brindle QC for NGC submitted that rule 27.3 introduced only a "general rule" to which there could, in principle, be exceptions. Further, he relied upon passages in the judgment of Jamadar JA in *Estate Management and Business Development Co Ltd v Saiscon Ltd* Civil Appeal No P104 of 2016 (unreported) 26 April 2017, at para 20:

> "A case management conference is therefore a court hearing specifically scheduled for the purposes of exercising active judicial case management in relation to particular proceedings. However,

> it is possible that at a court hearing of proceedings not specifically scheduled for active judicial case management, that a CPR judge can actively exercise case management powers. Such a hearing would, from a common sense point of view, also be, if only in part, a case management conference. This is because, it is the substance of what in fact occurs that matters, not the form that it takes. Thus, to determine whether or not there has been active judicial case management, the question to be asked and answered, is: 'Whether in fact there has been active judicial case management of proceedings by a CPR judge?'."

20. At first sight, these submissions make out a powerful case for an anxious analysis of the question whether automatic striking out was intended to be applicable to a case such as the present. As against SIS at least, NGC's claim was essentially for purely interim relief, that is, for relief pending the outcome of the arbitration. The question whether that relief should be granted or not had been fully argued over a three-day hearing and the parties awaited only the judge's reserved judgment as to the outcome. Why, it might be asked, in a case like that, should the CPR provide for automatic striking out, while the interim process remains pending, interim injunctions remained in force and where there would be unlikely to be any need for a trial at all?

21. A thorough review of the relevant rules, set against the procedural culture which was sought to be changed by their introduction, nonetheless leads the Board to the clear conclusion that rule 27.3 should be construed in the manner determined by the majority in the Court of Appeal so that, subject to relief from sanctions, there was indeed an automatic striking out of this claim under rule 27.3(4) 42 days after the filing of the defences, that is on 4 April 2016. Furthermore there is, in the Board's view, good reason why those responsible for the drafting of the CPR should have intended that outcome.

22. An invaluable guide to the unsatisfactory state of the civil litigation culture which the CPR were designed to address is to be found in the Foreword to the CPR by Chief Justice Sharma dated 28 April 2006. It commands a full reading, but the following extracts are sufficient for present purposes:

> "Before September 16, 2005 civil justice in the Supreme Court was governed by the Orders and Rules of the Supreme Court of Judicature 1975 ('the 1975 Rules') which came into operation on January 2, 1976 replacing the 1946 Rules. What had begun as a new system in 1976, designed to facilitate ordinary persons accessing the courts, had quickly degenerated by mid-1980s into a system fraught with barriers, real and psychological, to access to justice. The common thread running through the several Reports on the review of civil procedure spanning the period 1987-1997

was that the civil justice system under the 1975 Rules had been failing most conspicuously to meet the needs and expectations of the litigants.

Undoubtedly, that system was plagued with the 'triple evils' of delay, costs and complexity all of which were interrelated and stemmed from the uncontrolled nature of the litigation process. The several Reports alluded to above painted a very depressing picture of the civil justice system wherein delays were endemic and often contrived and the procedures were inflexible, rule-ridden and often incomprehensible to the ordinary litigant. The system encouraged an adversarial culture which often degenerated into an environment in which the litigation process was seen as a virtual battlefield rather than the arena for the peaceable resolution of disputes. The natural consequence, therefore, of this litigious culture was that the expense was often excessive, disproportionate to the value of the claim and unpredictable.

…

The CPR introduce a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system. This new procedural code is a radical departure from what obtains under the 1975 Rules. It is underpinned by the Overriding Objective in Part 1 which imposes an obligation on the courts to 'deal with all cases justly' and which embodies the principles of equality, economy, proportionality, expedition and procedural fairness, all of which are fundamental to an effective contemporary system of justice.

…

The CPR are founded on a system of case-flow management with active judicial case management: [Parts 25 and 26]. This new procedural code is buttressed by a plethora of rules which create several in-built mechanisms to foster settlement at the earliest and every stage of the proceedings: [Part 25.1(c), (d), (e)].

…

> Case management under the CPR is predicated upon a system which gives control and management of the pace and shape of litigation to the courts, removing it from the hands of the parties and their attorneys. Under the traditional adversarial system promoted by the 1975 Rules the pre-trial process was exclusively occupied with preparation for the trial and was largely controlled by the parties with minimal court intervention. In fact, the final outcome of cases was shaped not during the pre-trial stages but at the trial itself primarily because the decision-making process formed no material part of the pre-trial process. With the advent of the new system there has been a functional convergence of the pre-trial and trial process. The intense focus will be on the pre-trial stages since the adjudicative process begins as soon as the court assumes control over the case, which is at the case management conference.
>
> The case management conference, therefore, is at the heart of the new procedural code and is central to the success of the noble objectives embodied in Part 25. Generally, the case management conference is fixed for hearing within four to eight weeks of the filing of the defence and it is at this juncture that judicial supervision and management begin. Case management rulings with regard to early identification of issues, full and frank disclosure, the setting of meaningful pre-trial events and realistic timetables, fixing of firm and credible trial dates at a very early stage and referrals to ADR procedures are all designed to promote the expeditious resolution of cases while at the same time reducing costs, enhancing efficiency and creating certainty and predictability in the litigation process.
>
> The concept of early court intervention reflects the court's objective to resolve matters as early in the process as is reasonable by negotiated settlement and to reduce costs in litigation. Of fundamental importance to this concept is the process of continuous court control so that no case ever goes into 'judicial limbo'."

23. The CMC is, as the Chief Justice describes, at the heart of the new procedural code, and of the system whereby the court takes over from the parties (under the pre-CPR culture) the active management of cases for the furtherance of the overriding objective. The CMC is an event which must take place early in the progression of every claim except (i) for fixed date claims and (ii) where the judge otherwise orders, for example by dispensing with a CMC under rule 27.4.

24. Fixed date claims are appropriate for certain types of proceedings: see rule 8.1(4). For such claims, the court must fix a date for a first hearing of the claim and, on that occasion, the court has all the powers available at a case management conference: see rule 27.2(1) and (2).

25. The court's power to dispense with a CMC in relation to all other claims is carefully circumscribed by rule 27.4(1). Where it is exercised, the court must nonetheless give written directions for the preparation of the case, set a full timetable for steps until trial, fix a pre-trial review (unless itself dispensed with) and, in any event, fix a trial date or window: see rule 27.4(2). The result is that, even where a CMC is dispensed with, the court is required to carry out the two most important steps in court-controlled case management, namely fixing a trial and laying down a timetable for all preparatory steps, so as to ensure that the case is ready for trial on the fixed date (or in the window).

26. Those who have been involved in judicial case management under the pre-CPR culture and under the CPR, both in Trinidad & Tobago and elsewhere, in jurisdictions where similar reforms have been implemented, well know that the key to getting rid of the old culture, under which cases proceeded, if at all, only at the pace selected by the parties, is fixing a trial date (or window) and laying down a full timetable for its preparation. Rule 27.6(4) makes it clear that this is something which the court is required to do at a CMC.

27. It is because the CMC is the occasion upon which a trial date or window is chosen for a particular case that it lies at the intersection between the court's responsibility for case-flow management and its case management duty in an individual case. It is at that point that the court decides what resources should be made available to the parties, and at what time, for the determination of their dispute, as one of many for which the court is responsible, under an overriding objective which, in express terms, requires the court to allot to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases: see rule 1.1(2)(e).

28. In addition to fixing the trial date and timetable, the CMC is an event with important procedural significance for the parties in numerous other respects. First, it marks the end of a period when the parties have a relatively unrestricted opportunity to amend statements of case, add or substitute parties and introduce ancillary claims: see rules 10.6(3), 10.10(2), 18.4(1), (4) and (5), 19.2(2), (6) and (7) and 20.1(1), (2) and (3). The general thrust of these provisions is that the parties may amend, add parties and ancillary claims freely before a CMC, with the court's permission at a CMC, but only if they can demonstrate a relevant change of circumstances after a CMC.

29. The CMC is also the event which brings to an end the period during which a party may make an application for costs budgeting: see rule 67.8(2). In order to give the parties time to prepare for such matters, rule 27.3 lays down a timetable, pursuant to which: (i) the CMC must take place between four and eight weeks after the filing of defences (unless the case is urgent): see rule 27.3(9); (ii) the parties are to be given not less than 14 days' notice of the date, time and place of the CMC: see rule 27.3(13); and (iii) a timetable is laid down whereby the court office or, in default, the claimant must fix or apply to have fixed the date of a CMC in sufficient time to ensure that it takes place within the stated four to eight week window: see rule 27.3(3)(b).

30. Other provisions in the CPR emphasize the need for a CMC to be held at an early stage in the proceedings. Rule 15.6(2) requires the court to treat the hearing of a summary judgment application as a CMC, when the decision on the application does not bring the proceedings to an end. Likewise, the court may treat the hearing of an unsuccessful application disputing the court's jurisdiction as the occasion for a CMC: see rule 9.7(7)(b). When the court sets aside a default judgment under Part 13, it must treat the hearing as a CMC unless it is not possible to deal with the matter justly at that stage: see rule 13.6(1). If not, it must then and there fix a date, time and place for a CMC: see rule 13.6(2). More generally, by rule 11.11(4) the court may exercise any powers available at a CMC at the hearing of an interim application.

31. The rules also lay down requirements as to the attendance of parties, their attorneys and authorised representatives at a CMC: see rule 27.5. These are designed to enable the court and the parties to work together, with full authority, in the active management of the case, in accordance with the general duty of the parties, laid down in rule 1.3, to help the court to further the overriding objective.

32. Read together, these detailed provisions establish the following, in relation to the CMC:

i) It is the single most important event in the court's active management of each case, and in its integration of individual case management with its duties to manage its case-load as a whole.

ii) It is an event with very important procedural consequences for the parties, of which they are therefore to be given reasonable notice, and sufficient time to prepare.

iii) Even if the CMC is (for any reason) spread over more than one hearing, it is an event at the end of which there will definitely be a trial date or window, together with a full timetable for preparation.

iv) It is an event without which no claim (other than a fixed date claim) is to be permitted to proceed a significant distance beyond the exchange of statement of case and defence, unless the court, for good reason, orders otherwise.

33. In that context, it is not surprising to see, in rule 27.3, a structure in place which ensures that a claim cannot just fall into an old-fashioned limbo after exchange of pleadings, with no trial date or timetable in place. On that view, rule 27.3(4) does no more and no less than ensure that no such limbo, in which thousands of sleeping cases used to accumulate in the pre-CPR procedural culture, can occur.

34. Nor is the provision for automatic striking out a draconian penal consequence for a claimant whose failure to apply for the fixing of a CMC gives rise to that outcome. The claimant may apply, within three months of the filing of the last defence, for relief from sanctions, and the modern restrictive regime regulating relief from sanctions, in rule 26.7, is disapplied by rule 27.3(6). All the claimant need show is that the defendant has not suffered prejudice by reason of the claimant's failure to fix a date for the CMC. Even the restriction upon the court ordering the respondent to pay the costs of the application for relief from sanctions, save in exceptional circumstances, in rule 26.7(5), is disapplied. Of course, a claimant who delays beyond three months before making an application for relief from the automatic striking out sanction, under rule 27.3(5), will have to seek an extension of time, for which the court has a more general discretion (in furtherance of the overriding objective) under rule 26.1(1)(d).

35. Turning directly to Mr Brindle's submission that rule 27.3 should be purposively construed, there is nothing in the express provisions of that rule which dis-applies the claimant's duty to apply for the fixing of a CMC, where the court office does not do so, in circumstances where there is a pending interim application in which the court may already have applied some active case management or at the end of which it is likely that the court will give comprehensive directions. In particular, the "general rule" identified in rule 27.3(1) is only that the court office will fix a CMC. Where that general rule is not followed, rule 27.3(3) imposes a deliberately inflexible rule that the claimant must do so, with automatic striking out as the consequence if he does not.

36. There is in the Board's view no reason to imply any exception of the type for which NGC contend. This is, in particular, because it is not inevitable that the judge will, at the end of an interim process, conduct a CMC. Rule 17.7 merely gives the court a discretion to exercise its case management powers under Parts 26 and 27 at an interim hearing. It does not impose a duty to do so. The docketed judge did not in fact do so at the end of the interim applications in this case. It was a common occurrence under the pre-CPR procedural culture that parties became bogged down in interim applications, altogether losing sight of the need to progress the main proceedings towards trial. An interpretation of rule 27.3 which retains the duty of the claimant to apply to fix a date for a CMC (where the court office does not do so) notwithstanding pending interim

proceedings is, in the Board's view, a salutary means of ensuring that this does not occur under the reformed procedural regime introduced by the CPR.

37. It was faintly submitted that the judge, in adjourning the interim applications pending settlement negotiations, had impliedly dispensed with a CMC, pursuant to rule 27.4. It is readily apparent that the judge did not do so, by implication or otherwise. First, rule 27.4(2) requires the court, if it dispenses with a CMC, immediately to give written directions about the preparation of the case, to set a timetable between then and trial, to fix a pre-trial review and to fix the trial date or trial window. None of this was done by Charles J when adjourning the interim applications. Furthermore, she did not even dispense with a CMC when giving directions at the end of the interim applications. Rather, she gave some directions by way of preparation for the trial, but directed that a CMC take place at a fixed date in the future.

38. Finally, this was by no means a case in which the only relief being sought by NGC was interim relief, although that was true of the freezing order sought in aid of the arbitration. Relief was also sought in relation to the mortgages and debenture by way of declaration, and setting aside. Those plainly required a trial, unless dealt with by admission or summary judgment. Furthermore, the interim injunction against RFRL was specifically sought and granted over until trial. This was therefore a case in which, barring settlement or summary determination, a trial was going to be a necessity.

39. Nothing in the *Saiscon* case conflicts with the foregoing analysis. The issue in that case, as explained by Jamadar JA at para 3, was when did the first CMC in that case end. He concluded at para 21 that, for the purpose of rule 20.1(3), a first CMC was an event which could only start by being specifically scheduled for the purposes of exercising active judicial case management, and that this was to be distinguished from an occasion when, at a hearing of proceedings not specifically scheduled for active judicial case management, the judge actively exercises any such case management powers for the first time. Nothing done or directed by Charles J in the present case was effective to schedule a first CMC earlier than the date upon which, pursuant to rule 27.3(4), the claim was automatically struck out.

40. The Board is not by this analysis suggesting that in no circumstances will it ever be appropriate to conclude that the court has, by necessary implication, dispensed with the requirement for a claimant to apply for the fixing of a CMC. For example the court may decide (with the parties' consent or acquiescence) to make comprehensive case management directions at a hearing which was not scheduled for that purpose, without either stating in its order that a CMC was in fact being conducted, or expressly relieving the claimant from the duty to apply for a CMC to be fixed. In such a case it may be concluded by implication either that a CMC had occurred, or that the court had dispensed with the need for a CMC under rule 27.4, without actually saying so in terms.

41. Similarly it may be possible to imply that the court has given relief from the sanction imposed by rule 27.3(4) where, for example, it grants judgment on admissions after the date upon which automatic striking out occurred, because the continuation of the claim is a necessary predicate for the court's jurisdiction to give final judgment.

42. But implication of this kind will not lightly be made, and the necessity test for any implication is likely to be strictly applied. In particular it will not be likely to be made in the first of those examples where the court has not given all the directions required by rule 27.4 when dispensing with a CMC. In the second example the court and one or more parties may be entirely unaware that the striking out sanction has been triggered. In such a case, an application by the defendant to set the judgment aside on the basis that the claim had by then been struck out would have to be met by the claimant applying for relief from sanctions. The court would be in a position to exercise its wide discretion as to costs in order to achieve a result conforming to the overriding objective and the needs of justice.

43. It is possible that a different question might arise if cases were to proceed to trial and judgment on the merits after the time in which automatic striking-out has technically occurred, but without either the parties or the court appreciating that it had. No doubt such judgment would, as an order of the court, be valid unless set aside. There may be scope for argument whether, in such a situation, either the operation of rule 27.3(4) is excluded, or the grant of relief is necessary, however late, if application to set aside is made.

44. It would not be appropriate for the Board to seek to lay down, in advance, answers to procedural questions of this kind in the abstract. This decision applies only to the specific facts about the procedure which occurred in this case. Other examples where automatic striking out appears at first sight to come into potential conflict with the overriding objective will have to be addressed if and when they arise. It might be thought that such questions could usefully be addressed by the Trinidad and Tobago Rules Committee.

45. For those reasons, and subject only to what follows, this appeal should be dismissed.

46. The Board has considered whether there is anything which it could or should do about the question whether NGC should have relief from sanctions under rule 27.3(5) and (6). The present situation is, in the circumstances of this case, both unexpected and, in the broad scheme of things, undeserved.

47. The judge had before her an application filed on 7 June 2016 for relief against the automatic striking out. The Board is unaware of what, if any, discussion there may

have been before she made her order dated 14 June 2016 recording that permission was granted to NGC to withdraw the application. But the withdrawal clearly took place because, in the light of her conclusion that there had been no automatic strike-out, it was thought unnecessary and inappropriate to pursue the application on any basis.

48. Once the Court of Appeal reached an opposite conclusion about strike-out, it followed that the withdrawal had taken place on a mistaken premise. The Court of Appeal could, on that basis, have remitted the application to the judge for further consideration or (since it possessed all the powers of the judge: CPR rule 64.17) have allowed the matter to be raised before it, even if any such course would strictly have involved permitting the late issue of a counter-notice under CPR 64.7. Instead, it expressed a strong provisional view during oral submissions that the application was not before it, to which counsel's response was: "Well, my Lords, perhaps we could deal with that. Let us not speculate. We will deal with that at the appropriate time".

49. The matter was not revisited when the Court of Appeal handed down judgment. Instead, as the Board has pointed out, a fresh application dated 27 March 2017 was issued, which has been stayed pending the outcome of this appeal to the Board. The matter was not revisited on the appeal to the Board, until the Board itself raised it and invited further submissions on it.

50. The Board itself has all the powers of the Court of Appeal: Constitution, section 109(7). Nevertheless, the right course in the circumstances is in the Board's view to leave NGC to the procedural route which it chose by its application dated 27 March 2017 and confirmed by the limitation of its appeal to the Board to the issue of automatic strike-out.