IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G0104/2014

BETWEEN:

MICHAEL WITTER

APPELLANT

AND:

COX LUMBER LTD.

RESPONDENT

Appearances: **Mr. Clyde Allen for the Appellant**

Ms. Sarah-Jane Allison of HSM for the Respondent

Before: **Mr. Justice Seymour Panton**

Heard: **28th and 30th September 2015**

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JUDGMENT

INTRODUCTION

1. A Notice of Appeal was filed in this matter on the 25th June 2014. The appeal has not yet been heard. It was listed for hearing before me on the 28th September 2015. However, a summons to strike out the said appeal was also listed for hearing. Mangatal J, in a note on the file, suggested that the summons to strike out should take precedence. And so it did, when the matters were called on the 28th September 2015. I did not entertain the request of Mr. Clyde Allen, on behalf of the Appellant, that the appeal should be dealt with first.

2. Clearly, given the history of the matter, the proper course of action was to hear from Miss Sarah-Jane Allison, for the Respondent, on the application to strike out the appeal. This I did, and there followed submissions from Mr. Allen and a response by Miss Allison. At the end of these submissions, I concluded that it would have been inappropriate to strike out the appeal. Instead, upon handing down my decision on the 30th September 2015, I gave directions with a view to facilitating its early disposition.

SUMMONS TO STRIKE OUT THE APPEAL

3. On or about the 24th February 2005, the Appellant entered into a credit agreement with the Respondent. Goods were supplied by the Respondent in keeping with the agreement, and there are unpaid balances arising from the various transactions. The Appellant is alleged to have confirmed the debt by signing a promissory note for the payment of monies owed. It is also alleged that the Appellant has defaulted in respect of the promised payments. Consequently the Respondent filed a suit on 29th July 2013 in the summary court.

4. On 18th October 2013, default judgment was entered against the Appellant in the Summary Court for him to pay to the Respondent:

a. CI$8,691.42 – being the principal sum due;

b. CI$8,408.76 – pre-judgment interest calculated from the 1st January 2010 to 27th September 2013 at the rate of 18% per annum in accordance with the terms of the Credit Agreement; and

c. Post-judgment interest calculated from the 28th September 2013 at the rate of 18% per annum in accordance with the terms of the Credit Agreement.

5. On the 11th April 2014, the Appellant filed a summons in the Summary Court to set aside the default judgment on the basis that he had a good defence to the claim. The application to set aside the judgment was heard by Acting Magistrate Angelyn Hernandez who refused it on the 12th June 2014. The learned Magistrate also refused an application for leave to appeal. However, the learned magistrate stayed the examination of the judgment debtor pending an appeal to the Grand Court.

6. As stated earlier, a Notice of Appeal was filed on the 25th June 2014. The grounds of appeal allege, among other things, that the learned magistrate erred, in that:

a. "she failed to properly consider the tests to be applied as set out in the various authorities";

b. "she did not consider the draft Defence and the tests to be applied against it which was whether there was an arguable case for the defence";

c. she "placed too much weight on the facts of the delay in applying to set aside the judgment in Default";

d. "she considered and tried issues of fact on evidence from the affidavits of one side verses (sic) the other when that was in fact a function of the trial judge and not the judge hearing the set aside application"; and

e. "she failed to understand the basic facts and what apparent findings of fact made by her, albeit inappropriately found, were not based on actual or any evidence".

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7. Having filed his appeal, the Appellant apparently did nothing thereafter. The Respondent, on the other hand, moved to set aside the order staying examination of the Appellant Judgment Debtor. A summons to that effect was filed on the 8th July 2014. Efforts to serve this summons on the Appellant's attorney-at-law did not bear fruit until the 29th August 2014 when the summons was left at his office.

The summons was returnable on the 5th September 2014 but this date was inconvenient to the attorney who had a prior fixture before the Planning Appeals Tribunal. It was agreed between the parties that a new date should be fixed for the hearing. In the meantime, the following is noted in correspondence between the attorneys:

a. The appellant's attorney-at-law was out of the jurisdiction during the month of August;

b. A copy of the notice of appeal was attached to an e-mail and sent by the appellant's attorney-at-law to the respondent's attorneys-at-law on the 4th September 2014; and

c. Up to the 1st December 2014, the attorneys-at-law had not been advised of a date for the hearing of the appeal.

8. Subsequent to the change of date for the hearing of the summons to set aside the staying of the examination of the Appellant Judgment Debtor, there was correspondence between the attorneys-at-law and the court as regards the fixing of a date for the hearing of the appeal. There was also a letter dated the 2nd April 2015 from the Respondent's attorneys-at-law to the Appellant's attorney-at-law threatening to apply to strike out the appeal for want of prosecution if no hearing date had been "requested and obtained by 4 pm on 24th April 2015".

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9. Miss Allison helpfully provided the court with a written chronology of the relevant events in this matter as well as her skeleton arguments. In her submissions, she referred to the well-known cases of ***Birkett v James***[1] dealing with the discretion of the court to strike out an appeal for want of prosecution and ***Grovit v Doctor***[2] on the question of abuse of the process of the court. She also referred to two cases from this jurisdiction ***Geninvest SA v Bank of Butterfield International (Cayman) Limited***[3] and ***Executive Securities Corporation v Bland Investments***[4].

10. Miss Allison submitted that delay has been a feature of these proceedings since their inception. She pointed to the failure of the Appellant to file his defence in time, and what she described as his "unmeritorious" application to set aside the default judgment eight months after the plaint had been personally served on him. She added that the Appellant "has delayed by a further 12 months to pursue his Appeal to the Grand Court without any, or any good, excuse". The Respondent, she said, has in the meantime been "seriously financially prejudiced as it has been deprived from a significant sum of money…due to the Appellant's inactivity". In the circumstances, she urged the court to strike out the appeal for want of prosecution.

11. Mr. Allen acknowledged that no affidavit had been filed by the Appellant in response to the affidavit filed in support of the summons to strike out the appeal. I noted that he had also not filed any submissions in response to those filed by Miss Allison. However, he blamed the office of the Clerk of the Courts for not placing the copy of the stamped notice of appeal in his (the Appellant's attorney-at-law) mail box as is the custom. That stamped copy would then be served on the Respondent's attorney-at-law.

[1] [1977] 2 All ER 801
[2] [1997] 1 WLR 640
[3] [1999] CILR 223
[4] [1992-93] CILR 286

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He pointed to correspondence which indicated that there was a period of time when the relevant documents could not be located in the Court's office and so this caused delay in the process.

12. Mr. Allen submitted that the cases cited by Miss Allison were inapplicable in the instant situation. Although the Appellant had not filed an affidavit, Mr. Allen submitted that this did not preclude the Court from disposing of the matter in a manner favourable to the Appellant seeing that all the factual matters had been placed before the Magistrate and were in the file before the court. He said that the Appellant has a good defence to the suit and that the Magistrate had failed to properly consider the material before her. In the end, he said, she did not exercise her mind on the criteria to be applied, and wrongly exercised her discretion in refusing to set aside the default judgment.

13. In answer to me, Miss Allison said that the Appellant has a duty to serve the notice of appeal on the Respondent within fourteen days. A listing form is then to be sent back and a hearing date fixed. Thereafter, hearing bundles are to be prepared. She referred to r.15 and form 8 of the Summary Court Rules, as well as to GCR O.42 r. 5. Mr. Allen, in response, said that the GCR are not applicable and that the Summary Court Rules make no provision as to the time for service.

14. In ***Geninvest S.A. v Bank of Butterfield International (Cayman) Limited***, *supra,* Smellie, C.J. on an application to strike out an action for want of prosecution, had to consider the questions of inordinate and inexcusable delay, financial prejudice and abuse of process. After acknowledging that there had been inordinate delay in the matter before him, he said that an issue before him was whether inordinate delay by itself will result in striking out. He then made reference to and applied the principles in ***Birkett v James***, *supra.* This is what he said:

> *"The decisions of this court in the past would require that serious prejudice or detriment to the applicant must also be shown: see, e.g.* ***Harveys v. Scott*** *[Grand Court Cause No. 763 of 1990, July 25th 1994, unreported]. And as I understand the tests laid down by law, upon a strike out application for want of prosecution, it is not simply a question of whether the defaulting plaintiff lacks a creditable excuse. The principles are nowhere more succinctly stated than in the oft-cited passage from the speech of Lord Diplock, applying* ***Allen v. Sir Alfred McAlpine & Sons Ltd. (1),*** *in the House of Lords case of* ***Birkett v. James (2)*** *([1977] 2 All E.R. at 805):*
>
> > *"The power [to strike out for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."*"

15. As both parties before me clearly acknowledged, the principles are the same whether it is a matter for trial at first instance or a matter on appeal. It is in the interests of justice that matters for adjudication are dealt with as quickly as the prevailing circumstances allow. However, there should be no rush to judgment. At the same time, slothfulness cannot be allowed to prevail.

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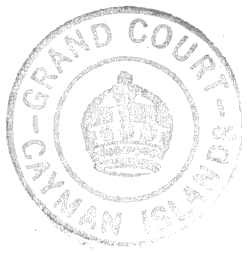
16. In the instant case, the Respondent to the appeal is complaining that the Appellant has not taken any of the steps the Respondent feels are necessary for the hearing of the appeal. But, is this really so? What is an Appellant in this situation supposed to do, having filed an appeal? In my view, the answer ought to be sought in the statute and the rules that govern appeals from the Summary Court to the Grand Court.

17. Section 38 of the Summary Jurisdiction Law (2006 Revision) gives the right of appeal from any final judgment or decision of the Summary Court to the Grand Court. Such an appeal is to be made in a form prescribed by the Summary Court Rules 2004 and must be filed within fourteen (14) days of the judgment or decision[5]. The filing procedure is governed by GCR O.42 r 5. The latter rule requires the appellant to draw up the judgment or order being appealed and present it, with sufficient copies for the parties, to the Clerk of the Courts, who is required to file and seal same. The Clerk of the Courts is then to notify the Appellant of the filing and provide as many sealed copies as the Appellant wishes (presumably for service).

18. My research and my enquiries of the attorneys-at-law have not resulted in the identification of any rule that specifies the time within which the notice and grounds of appeal are to be served. It seems that there may have been an oversight in this regard. It goes without saying that there must be service on a party involved in an action in which an appeal has been filed. In the absence of a specific provision for the time for such service, I am of the opinion that guidance is provided by s.9 of the Interpretation Law (1995 Revision) which states:



[5] See r.15(1).

> *"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed, and as often as the prescribed occasion arises".*

19. In the instant case, the appeal was filed on the 25th June 2014. A copy of the notice was sent by e-mail to the Respondent on the 4th September 2014. There were some difficulties in the office of the Clerk of the Courts that apparently caused a delay in the provision of the sealed copies to the Appellant's attorney-at-law, and further no date has been fixed for the hearing. As I understand the facts, I cannot say that the Appellant has been guilty of inordinate and inexcusable delay in the prosecution of the appeal. The blame really cannot be placed at his feet. Consequently, I found no merit in the application and refused it. The costs of these proceedings are to be costs in the appeal.

20. In dismissing this summons, I ordered the appellant to file and serve his submissions by the 9th November 2015, and the Respondent to file and serve its submissions by the 18th November 2015. The Listing Officer is to schedule no more than two hours for the hearing of this matter, and the parties are expected to co-operate to ensure its disposition as soon as possible.

.Dated this the 26th day of October 2015

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Mr. Justice Seymour Panton
Acting Judge of the Grand Court