

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 1994

BETWEEN:

THE BARBUDA COUNCIL

Appellant

and

[1] THE ATTORNEY GENERAL
[2] ANTIGUA AGGREGATES LIMITED
[3] SANDCO LIMITED

Respondents

Before:

The Hon. Sir Dennis Byron

Chief Justice

Appearances:

Mr. Gerald Watt Q.C. for Appellant Barbuda Council represented Mr. Fabian Jones

Mr. Hugh Marshall with Gary Collins, Ms Samantha Marshall for 2nd Respondent – party represented by Mr. Hugh Marshall Snr.

Hon. Gertel Thom as Attorney General in person and Mr. John Fuller with her

2003: September 16;
2004: January 15.

JUDGMENT

[1] BYRON, C.J.: Antigua Aggregates has applied to have this appeal dismissed for want of prosecution on the ground that the Barbuda Council has not filed the record of appeal within the required time or at all.

The Background

- [2] This is a very old matter with a long, unfortunate history. The proceedings were initially commenced in 1988, about 15 years ago. Judgment was delivered on 19th September 1994. It is instructive to note that the judgment declared that the Barbuda Council was entitled to the protection of the islands ground water reserve at Palmetto Point and to the collection of tonnage dues from Sandico and or Antigua Aggregates. The Barbuda Council filed an appeal on 27th September 1994. It was not until 4th November 2002 that the court office delivered the said notes to the appellant after a delay of about 8 years. I think that it should be noted that the reasons given for the delay by the authorities included staff shortages. I can take judicial notice during this time other appeals were proceeding according to more acceptable time standards.
- [3] I think that it is of material significance that on 24th January 2002 the Barbuda Council issued a claim against Antigua Aggregates and Sandico for amounts claimed to be owing for tonnage dues. This matter has not yet been heard and is a pending case. It is significant because these proceedings were filed some 8 years after the High Court had declared that the Barbuda Council was entitled to the said tonnage dues.
- [4] It is questionable whether there are any really serious issues for hearing on this long overdue appeal. In fact the record points to two matters. One relates to the rights of the Barbuda Council against those of the Central Government and the other relates to the quantification and payment of the tonnages dues by Antigua Aggregates and Sandico.
- [5] All counsel before me agreed that it was no longer necessary to address the issue of the rights of the Barbuda Council in these proceedings because they were addressed in another case brought by the Barbuda Council against the Government of Antigua and Barbuda, [known as the Unicorn case]. Counsel for

the Barbuda Council conceded that there was no need for the Attorney-General to continue as a party to this appeal at all. The only outstanding issue was the question of payment of tonnage dues.

[6] Counsel for Antigua Aggregates contended that the appeal was entirely misconceived because the relief that the Barbuda Council was seeking could and should have been obtained by the issue of proceedings before a trial court judge but it was not until 2002 that such proceedings had been issued. He contended that the appeal was wasteful, and the extensive and inordinate delay was very prejudicial to the operations of the company and was inhibiting its business activities in Barbuda.

[7] It is well established that the courts discretion is exercisable in accordance with its consideration of the length of delay, the reasons for delay, the merits of the appeal and the prejudice to the litigants.

Length of Delay

[8] The appellant has taken no steps to complete the appeal record. Over 8 months has elapsed since it has received the transcripts. We have often ruled that such a period of delay is inordinate and excessive.

The Reason for Delay

[9] There are two issues here. In the first place the court office was responsible for the initial delay. The reason of staff shortage was unsatisfactory because other appeals were progressing at a fairly normal pace. But then the transcript was delivered and the appellant has taken no steps to get the record ready for filing. It alleges that the reason for delay was financial inability caused by the failure of the central government to pay subventions on a timely basis. The supporting affidavit however, revealed that all subventions have been paid except for the current

month which has been partially paid. This is a default because the subventions are required to be paid monthly in advance. But the conclusion is inescapable that the reason given by the appellant was not the cause of the delay, and was therefore not a good and substantial reason.

- [10] Counsel for the appellant suggested that the history of the matter should be taken into account and that some indulgence should be afforded the appellant. I do consider that the long 8-year wait for the transcript must have affected the appellant adversely. However, my discretion cannot be based on that alone. In the end my decision has to be aimed at dealing justly with case.

The Merits

- [11] It was conceded by all parties that the only issue left for argument on appeal is the quantification and payment of the tonnage dues. The trial judge had declared the liability to pay the tonnage dues but did not quantify the amount nor make an order for taking an account. The appellant chose to appeal that failure. In reality this was not a matter for appeal. It was a first instance matter. The declaration of entitlement could have been quantified and enforced at any time after the judgment had been entered. It is true that a court of appeal could make orders facilitating the quantification process, but it could also simply remit the matter to the trial court where it really belongs. The point is that there was no need for this appeal. The expense to the litigants and the allocation of judicial and court office time and resources has been and would continue to be wasted. I was informed by Counsel for Barbuda Council that the cost of record preparation would be very expensive. These considerations would normally require the court to refuse to exercise a discretion to extend the time for filing the record of appeal.
- [12] The Barbuda Council eventually commenced trial court proceedings to collect the tonnage dues. During argument its counsel expressed doubt about his ability to rebut the defence on the Statute of the Limitation of Actions which had been

raised in that case. He urged the court to exercise some indulgence and leave the safety net which this appeal may supply. Is this a suitable criteria for the exercise of a discretion? I think not. In addition, it is settled policy that discretions relating to extensions of time should not be used to circumvent the application of the statutory regime of limitation of actions.

Prejudice

[13] In the affidavit in support of this application the respondent's deponent testified that it continues to suffer prejudice by the delay in the final determination of the appeal. There is no doubt that the appellant is prejudiced by the excessive delay in the resolution of this appeal. Delay in the collection of debts, including judgment debts, has been regarded as sufficiently prejudicial for regulatory schemes to protect the debtor from exposure to judicial process after certain time has elapsed. This was made evident in the case *Morrison Knudsen International Inc v The Consultant Limited and Barclays Bank PLC*, Grenada, Civil Appeal No.15 of 2002, where it was pointed out that a judgment creditor was debarred from issuing execution process without the leave of the court after six years from the entry of judgment. The degree of prejudice is based on delay and is not affected by the fact of the liability to pay tonnage dues. No allegations have been made to suggest that Antigua Aggregates or Sandico were in any way to blame for any part of the inordinate and improper delay.

[14] There is no doubt that the State is at least partly to blame. But, the Barbuda Council is also to blame. In the first place the entire delay was caused by its judgment to appeal, which was an unnecessary and inappropriate method to enforce its rights to the tonnage dues. The respondent has been waiting for nearly 10 years for the dispute to be resolved. This excessive delay offends the overriding objective. Justice delayed is justice denied.

Order

[15] I would dismiss the appeal for want of prosecution. No order as to costs.

Sir Dennis Byron
Chief Justice