

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 of 1989

BETWEEN

WILLIAM CODY KELLY

Appellant

and

ARAWAK MOTORS LIMITED
ROBERT HALSEY
KENT E. DOYLE

Respondents

Before: The Honourable Chief Justice Floissac - President
The Honourable Miss Justice Joseph J.A. (Ag.)
The Honourable Mr. Justice Singh J.A. (Ag.)

Appearances: Mr. C. Lloyd Luckhoo, Q.C., Dr. Cort with him for the
appellant
Miss Bernice Violante Lake Q.C., Miss Joyce Kentish
with her for the respondents

1992: February 27
June 9.

JUDGMENT

SINGH J.A. (Ag.)

On 5th March, 1984, the appellant entered judgment in default against the second and third named respondents on a writ that was served on them outside the jurisdiction of the Court. The writ was bad for two reasons -

1. It was issued without the leave of the Court and in breach of O6 R6(1) of the Rules of the Supreme Court 1970.
2. It was served on the respondent more than one year after the date of its issue without an order from the Court extending its validity in breach of O6 R7(1) of the aforementioned Rules.

On July 4, 1986, upon the application of the respondents, Redhead J. set aside the default judgment and the Writ. At the hearing of that application, the aforementioned breaches were acknowledged by the appellant and he prayed in aid before the learned Judge the exercise of the Court's discretion in his favour under Order 2 of the aforesaid Rules and asked for retroactive remedy of the breaches. He filed no application under O6 R7(2) for the extension of the validity of the writ and provided no evidence

by way of affidavit or otherwise for the use of the court in the requested exercise of its discretion.

What was before the court was the invalid writ, the judgement in default, the application of the respondents and the arguments of Counsel. Having considered the authorities referred to him, the learned judge ruled that the invalidity of the writ could only be cured by an application under **O6 R7(2) of the Rules of the Supreme Court** and that in the circumstances of the case where the respondents had entered conditional appearance, thereby not waiving the irregularity of the Writ, it would not be a proper exercise of his discretion to extend the validity of the writ retroactively. The appellant appeals from that ruling.

O6 R7(2) states:-

"Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if any application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

O2 R1 states:-

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3)"

Both of these rules of necessity require a judge to exercise his judicial discretion. Such a discretion cannot be exercised in

vacuo. It can only be done on evidence placed before the Court.

In *Waddon v Whitecroft-Scovill Ltd* (1988) 1 AER 966 at 1000, Lord Brandon (delivering the judgment of the House of Lords) said:

" In the *Kleinwort Benson* case the House, after reviewing a long line of authorities on the present RSC Ord 6, r 8 and its predecessor, laid down the following principles as applicable to the exercise of the court's discretion on an application for extension of the validity of a writ in cases where questions of limitation of action are involved. (1) On the true construction of Ord 6, r 8 the power to extend the validity of a writ should only be exercised for good reason. (2) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but it is not the only matter which is capable of doing so. (3) The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. (4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well established."

In the context of the instant appeal, before the judge could have exercised his discretion under O2 R1 in favour of the appellant he had to satisfy himself from evidence or circumstances placed before him that there was good reason for the extension of the validity of the writ and that had the appellant made an application under O6 R7(2) for such extension that such an application would have been granted. If he does not so satisfy himself but proceeds to exercise his discretion under O2 R1 in favour of the appellant, then he would be allowing the appellant to circumvent O6 R7(2).

There was no application filed with the Court to extend the validity of the writ. Such an application could not properly have been made *viva voce* by counsel during the arguments opposing the application to set aside the default judgment. The learned trial judge therefore had no proper material before him whereby he could have exercised his discretion in favour of the appellant.

For these reasons I find no merit in this appeal and I would affirm the Order of the trial Judge and dismiss the appeal with costs to the respondents to be taxed if not agreed.

(Sgd.) Satrohan Singh

 SATROHAN SINGH
 Justice of Appeal (Ag.)

I concur.

(Sgd.) V.F.Floissac

 V.F.FLOISSAC
 Chief Justice

I concur.

(Sgd.) M. Joseph

 M. JOSEPH
 Justice of Appeal (Ag.)