

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1991

BETWEEN

ST. KITTS APPAREL LIMITED

Appellant

and

THE BANK OF NEVIS

Respondent

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

Appearances: Dr. Henry L. Browne and Miss M. Walwyn for Appellant
Mr. C. Wilkin for Respondent

1992: March 26.

JUDGMENT

JOSEPH, J.A. (Ag.)

On 22nd July, 1991 the appellant filed Notice of Appeal against judgment of Singh J. delivered on 20th June, 1991, but failed to file the record of Appeal within the six week period which expired on 2nd September 1991, as required by Order 64 Rule 11(1).

Following that default the respondent filed a motion on 10th March 1992 for the dismissal of the appeal for want of prosecution pursuant to Order 64 R 13 (2), and in response thereto the appellant filed a motion on 20th March 1991 seeking leave to file the record of Appeal out of time.

The Court has power to dismiss the appeal for this default vide Order 13 Rule 2 which reads:

"If the Appellant has failed to comply with the requirements of paragraph (1) of Rule 11 the respondent may apply to the Court to dismiss the appeal for want of prosecution and the Court, if satisfied that the appellant has

so failed, may dismiss the appeal or make such order as the justice of the case may require."

The Court also has power under Order 3 Rule 5 to extend the time for filing the record, but the appellant did not avail itself of this jurisdiction until its application for leave filed on 20th March, 1992.

In advancing the reason for this delay the appellant's affidavit disclosed that the notes of evidence were delivered on 27th September, 1991 and due to the illness of its solicitor the record could not be completed for the sitting of the Court in October 1991. The appellant, however, gave no explanation whatsoever for its failure to prosecute the appeal during the period that elapsed between October 1991 and March 1992.

Courts have often ruled that the discretion to extend the time for filing a record of appeal will not be exercised where good and sufficient reasons for the delay have not been shown. To persuade the Court to extend the time it is therefore essential for the appellant to give cogent reasons for the delay.

This principle has been expressed by Lord Guest in *Ratnam v Cumarasamy* (1964) 3 AER 933 at 935 as follows:

"The rules of Court must, prima facie, be obeyed, and, in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until

a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise discretion in favour of the appellant. In these circumstances, their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle."

This decision was followed in this region in several cases including Barbados in **Barrow v Caribbean Publishing Co. Ltd. (No.2)** 1967 11 W.I.R. 176, in Jamaica in **City Printery Ltd. v Gleaner Co. Ltd.** 1968, 13 W.I.R. 126 and in St. Lucia **Civil Appeal No.3 of 1991 Michael Alexander v Attorney General and the Director of Public Prosecutions** (unreported).

On the issue as to what the justice of the case requires the respondent's affidavit shows that the judgment obtained was to enforce payment of a debt owed to a bank that was secured by a debenture and that the assets are depleting. No argument was addressed to us on the merits of the appeal but the respondent's affidavit shows a chain of circumstances that indicate that there has been undue delay throughout the conduct of these proceedings which could lead to the conclusion that delay is an objective of the appellant.

It is incompatible with the idea of fair play or justice that a judgment creditor can be prevented from enforcing its judgment by an appellant who fails to prosecute its appeal for no good reason.

As no good and sufficient reason has been advanced for the delay of over six months in applying for an extension of time to file the record of appeal out of time, there is nothing on which to base the exercise of the Court's discretion in favour of the appellant and the application for extension of time is therefore

dismissed, and the appeal⁴ is accordingly dismissed for want of prosecution with costs.

(Sgd.) M. JOSEPH
Justice of Appeal (Ag.)

(Sgd.) V.F.FLOISSAC
Chief Justice

(Sgd.) C.M.D.BYRON
Justice of Appeal