

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 10 of 2013**

**BETWEEN:**

**T. G HOLDINGS LIMITED**

**Appellant**

**AND**

**HOST MARRIOTT L.P**

**First Respondent**

**S.L.C. RECOVERY LIMITED**

**Second Respondent**

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.**

**2016: February 23, May 9,  
December 7**

**Mr. Douglas Trotman, Mrs. Kathy-Ann Trotman and Mr. Decoursey Eversley for the Appellant.**

**Sir Henry de B. Forde, KA, QC, Mr. Christopher Hamel-Smith SC, Mr. Benjamin D. Norris and Mr. David Hamel-Smith for the Respondents.**

**DECISION**

**GOODRIDGE JA**

**Introduction**

[1] By this application, this Court has been asked to set aside the order which it made on 23 February 2016 striking out the appeal and ordering the appellant to pay the respondents' costs to be assessed if not agreed.

## **Background**

- [2] The appellant brought a claim against the respondents in the High Court. On 2 August 2013 **Worrell J** dismissed that claim with costs to the respondents. On 2 September 2013 the appellant filed a notice of appeal against that decision.
- [3] The appeal was not prosecuted by the appellant in accordance with the provisions of **rule 62.12** of the **Supreme Court (Civil Procedure) Rules, (CPR)**. Communications ensued between the parties on the inaction and default of the appellant. By letter of 24 August 2015 the respondents put the appellant on notice that if it persisted in its default, the respondents would file an application to strike out the appeal for want of prosecution and/or non-compliance with **rule 62**.
- [4] There was no response to this correspondence and a follow up letter was sent by email to the appellant on 28 August 2015. The respondents filed their application to strike out on 31 August 2015. It is to be noted that the case management conference was scheduled for 30 September 2015.
- [5] After a number of conversations between the attorneys-at-law for the parties, a compromise agreement was reached. At the hearing of the case management conference on 30 September 2015, the respondents withdrew their application to strike out and an order embodying the terms of the

compromise agreement was made by consent (the consent order). That order states:

"IT IS ORDERED BY CONSENT THAT:

1. Unless the Appellant files and serves its skeleton arguments on or before the 14th day of October, 2015, the appellant shall forthwith file and serve a Notice of Discontinuance of the Appeal;
2. If the Appellant files and serves its Skeleton Arguments on or before the 14th day of October 2015:
  - a. The Appellant shall file six (6) copies of the Appeal Papers on or before the 30th day of October 2015 and serve a copy thereof on Messrs. Clarke Gittens Farmer, Attorneys-at-Law for the Respondents on or before the same date;
  - b. The Respondents shall file and serve Skeletal Arguments on or before the 24th day of December 2015;
  - c. The Appellant may file and serve a Skeleton Argument in reply on or before the 4th day of January 2016;
  - d. The Appeal shall be set down for hearing for a period of two (2) days on the 23rd day of February 2016 and the 24th day of February 2016."

[6] The appellant did not serve its skeleton arguments on or before 14 October 2015. The respondents then sent a letter dated 22 October 2015 to the appellant in which it reminded the appellant of the terms of the consent order. On 2 November 2015 the appellant's counsel left a set of unfiled

documents at the offices of the respondents' attorneys-at-law. No notice of discontinuance was filed.

[7] Further correspondence passed between the parties in which the respondents reminded the appellant of its non compliance with the consent order.

[8] By letter of 1 February 2016, the respondents informed the appellant that, since it had taken no steps to seek relief from the sanction imposed by the consent order or to further pursue its appeal, the respondents would apply for the appeal to be struck out or dismissed if the appellant did not file and serve its notice of discontinuance.

[9] On 9 February 2016, the respondents filed a notice of application supported by the affidavit of Mr. David Hamel-Smith, attorney-at-law. The application came on for hearing before this Court on 23 February 2016. The appellant was absent and as stated earlier, the appeal was struck out with costs.

### **The Application to set aside**

[10] On 14 March 2016, the appellant filed an application "pursuant to **rule 62.21** and **62.23**" seeking to have this Court's order set aside on the following grounds:

"(i) That the Attorney-at-Law for the Appellant was not present at Court on the 23rd February 2016 when the Order was made to have the Appeal struck out.

(ii) That the Attorney-at-Law was on two months certified medical sick leave from the 3rd February, 2016 and the

Registrar of the Court of Appeal and the Attorneys-at-Law for the Respondents were duly informed.

- (iii) That the Director of the Appellant was not present at court on the 23rd February, 2016 as he was on certified medical sick leave and the Court of Appeal was duly informed.
- (iv) That the Attorney-at-Law for the Appellant was unable to peruse and respond to the Application dated the 9th February, 2016 filed by the Attorneys-at-Law for the Respondents. This was communicated to Mr. Benjamin Norris, one of the Attorneys-at-Law for the Respondents, prior to service of the Application at the office of the Attorney-at-Law for the Appellant.
- (v) That Mr. Benjamin Norris spoke to Mr. Decourcey Eversley Attorney-at-Law on the 14th October, 2015 who informed him that the Attorney-at-Law for the Appellant was working on finalising the documents for filing.
- (vi) That the Attorney-at-Law for the Appellant attempted to file the documents to settle the record on the 30th October 2015 and the Deputy Registrar (ag) for the Court of Appeal instructed the clerk for the Court of Appeal not to accept the documents. The Attorneys-at-Law for Respondents were served with a copy of the un-filed documents.
- (vii) That the Appellant is in receipt of fresh evidence which it believes affects the hearing of the matter. That evidence is that the judge who heard the matter at first instance was called to practice (sic) law in Barbados under and by virtue of laws which are flawed thus raising the question as to the validity of call to the Bar and subsequently the validity of any appointment to become a judge of the Supreme Court of Barbados. The issue was raised verbally by Mr. Douglas Trotman, Attorney-at-Law for the Appellant both with the judge at first instance and the Chief Justice of the Supreme Court of Barbados. Mr. Trotman, being on sick leave has not had the opportunity

to raise the issue before this Honourable Court and now seeks leave of the court to amend the grounds of Appeal."

[11] The application was supported by the affidavit of Mr. Thomas W.K. Grant, a director of the appellant. In that affidavit, Mr. Grant deposed that he was aware of the consent order. In large measure, the affidavit supported the grounds of appeal. According to Mr. Grant, he was informed by Mr. Trotman that (i) the skeleton arguments had been filed on 14 October 2015 but were served on 15 October 2015; (ii) he had spoken to one of the attorneys-at-law for the respondents, Mr. Benjamin Norris, and expressed his view that the breach being complained of was not a material breach and that the appellant would not be issuing a discontinuance in the matter; (iii) Mr. Trotman told Mr. Norris that if the respondents felt that it was indeed a material breach they should make the application to have the appeal dismissed.

[12] Mr. Grant exhibited a copy of Mr. Trotman's medical certificate. Mr. Grant deposed that he was also on certified medical leave on the date of the hearing and that this Court was informed of his position.

[13] Further, Mr. Grant stated that it had come to his attention that one of the attorneys-at-law for the respondents "in the matter at first instance may not have been properly qualified as an Attorney-at-Law to practice law in this jurisdiction". He deposed that he subsequently informed Mr. Trotman that

“Justice Worrell's credentials too should be questioned as they were both called at the same time under the same law”. Mr. Grant stated that speaking with Mr. Trotman about this matter, he was informed by Mr. Trotman that "the legislation under which the call was made was flawed and that he believed that this would have an impact on the case".

- [14] Mr. Grant also deposed that he believed that if Mr. Trotman had been able to attend the hearing, the matter would not have been struck out but a different decision would have been reached. He concluded by asking the Court to grant the appellant leave to respond to the application filed on 9 February 2016 and to amend the grounds of appeal to include fresh evidence.

### **Submissions of the Parties**

#### ***The Appellant's Submissions***

- [15] Mr. Douglas Trotman, counsel for the appellant, noted that a medical certificate had been exhibited to the affidavit of Mr. Grant. According to that certificate, the reason for his absence from court on 23 February 2016 was because he had been placed on certified medical leave for a period of 2 months. Counsel submitted that the question was whether or not the Court accepted that the medical certificate provided a good reason for his failure to attend the hearing.

- [16] Mr. Trotman next referred to paragraph 18 of Mr. Grant's affidavit where Mr. Grant had deposed that he had also been on certified medical leave and that the Court had been duly informed.
- [17] Counsel conceded that he could not deal with the issue of fresh evidence until he had made a proper application under **rule 62.23** but stated that such application would have been made if he had not been on sick leave.
- [18] Mr. Trotman also submitted that in keeping with the overriding objective, and in the interest of justice and fairness, the appellant ought to be given the opportunity to respond to the application to strike out the appeal because of the importance of the case, the amount of money involved, the complexity of the issues and the financial position of the parties.
- [19] However, counsel acknowledged that in requesting the Court to set aside its decision and give the appellant 14 days within which to make a response to the application to strike out, he faced an uphill task because the case started in 2005.

***The Respondents' Submissions***

- [20] Mr. Christopher Hamel-Smith, SC, counsel for the respondents, submitted that the appellant had not satisfied the requirements of **rule 62.21** and the application could not succeed. He noted that while the Court had been informed of the reason for Mr. Trotman's absence on 23 February 2016, and

a certificate was exhibited to Mr. Grant's affidavit, no documentation was produced in respect of the absence of Mr. Grant who identified himself in his affidavit as a director of the appellant.

[21] Counsel contended that, when considering the medical certificate for Mr. Trotman, it was for the Court to decide whether the expert medical evidence produced was such as to persuade the Court that there was a good reason for Mr. Trotman's failure to attend. He submitted also that it was unclear whether the illness Mr. Trotman was suffering from specifically precluded him from attending court on that particular day. Mr. Hamel-Smith SC referred to two English decisions, **Levy v Ellis-Carr [2012] EWHC 63(Ch)** and **Emojevbe v Secretary of State for Transport [2015] EWHC 1523(QB)**, where applications were made under the English CPR 39.3 (a rule similar to **62.21**) by persons who did not attend trial due to illness. Mr. Hamel-Smith SC contended that the certificate did not provide the required information so as to enable the Court to conclude that there was a good reason for failing to attend.

[22] Mr. Hamel-Smith SC next submitted that, even if the Court found that the medical certificate was sufficient for the Court to conclude that there was a good reason for Mr. Trotman personally not to be present on that day, that by itself did not satisfy the requirement of the rule, because the appellant

could have appeared through alternative counsel. In this regard, counsel pointed out that at the case management conference on 30 September 2015, the appellant was represented by other counsel, Mr. Eversley, who was acting in association with Mr. Trotman. Mr. Hamel-Smith SC stated that according to paragraph 4 of Mr. Grant's affidavit, at the minimum, Mr. Eversley was involved in dealing with the matter on behalf of Mr. Trotman on 14 October 2015. He considered that the appellant had not shown a good reason by way of affidavit evidence why it could not have attended through Mr. Eversley. There being no good reason advanced for the failure to attend, the appellant's application should be dismissed.

[23] Mr. Hamel-Smith SC continued that, in the event the Court was not persuaded by this argument, and found that there was a good reason for the failure to attend, the next question for the Court to decide was whether it was likely that had the appellant attended, some other decision might have been made.

[24] Counsel noted that Mr. Trotman was asking the Court to set aside its decision in order to give the appellant an opportunity to respond to the affidavit of Mr. David Hamel-Smith. However, he submitted that Mr. Hamel-Smith's affidavit showed that (i) nothing was done to advance the appeal, (ii) the respondent wrote repeatedly to the appellant urging the

appellant to do what the rules required; (iii) the appellant repeatedly failed to comply with the rules leading to the initial application to strike out the appeal; and (iv) the appellant failed to comply with the consent order.

[25] Mr. Hamel-Smith SC drew the Court's attention to the fact that, although the appellant had not complied with the consent order, no application was ever made for an extension of time.

### **Court's Analysis and Conclusions**

#### **Relevant Rule - Rule 62.21 of the CPR**

[26] The rule most central to this application is **rule 62.21**. This rule provides as follows:

"Application to set aside decision made in party's absence

62.21(1) A party who was not present at an appeal at which a decision was made or the appeal was struck out in his absence, may apply to set aside that order.

(2) The application must be made within 14 days after the date on which the judgment was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing

(a) a good reason for failing to attend the hearing;  
and

(b) that it is likely that had the applicant attended, some other decision might have been made,

the court after taking into account the circumstances including the position of the respondent to the application, and the merits of the appeal, shall make such order as appears to it to be just."

[27] It is clear that this rule gives a party who did not attend an appeal the opportunity to apply to this Court to have any order made in his absence set aside. In our judgment, the discretion to set aside is not a broad discretion but one which may only be exercised if the conditions set out in that **rule** are satisfied. These conditions are as follows:

1. The applicant must have a good reason for failing to attend.
2. It must be shown that it is likely that had the applicant attended some other decision might have been made.
3. The Court, after taking into account the circumstances including the position of the respondent to the application, and the merits of the appeal, shall make such order as appears to it to be just.

***Condition 1 - The applicant must have a good reason for failing to attend***

[28] First we consider whether the appellant has shown that it had a good reason for failing to attend.

[29] The phrase "a good reason" has not been defined in **rule 62.21** and in our opinion must therefore be given its ordinary meaning. In determining what amounts to a good reason for absence, the Court must consider all the evidence in each case, bearing in mind the Court's duty when

exercising any power or discretion given to it by the **CPR** to give effect to the overriding objective of dealing with cases justly.

[30] In this regard, we note the dicta of Mummery LJ in the English Court of Appeal decision of **Brazil v Brazil [2002] EWCA Civ 1135**:

"In my opinion the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree ...that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true reason for non attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance."

[31] The appellant seeks to rely on the medical certificate for Mr. Trotman as providing a good reason for Mr. Trotman's absence. The question which we must ask ourselves is whether the medical evidence demonstrates that Mr. Trotman was unable to attend court and participate in the hearing.

[32] In our view, the medical evidence placed before the Court should (i) detail any recent consultation; (ii) identify with particularity the party's medical condition and the features of that condition which prevent the party from participation in the appeal; (iii) provide a reasoned diagnosis; and (iv) satisfy the Court that the opinion expressed is an independent opinion formed after a proper examination. The Court would then be in a position to assess this expert evidence and decide what weight to attach to it.

[33] The medical certificate is dated 3 February 2016 and signed by Dr. Harold Watson who certified that he had seen and examined Mr. Trotman. He found that Mr. Trotman has "left flank pain and neuroasthesnia which is affecting his ability to perform his duties to his clients. He has therefore been advised to take leave of 2 months". In our judgment, the medical evidence provided is sufficient for us to conclude that there was a good reason for Mr. Trotman's absence.

[34] Even though we are satisfied that there is a good reason for Mr. Trotman's absence, that is not the end of the matter. According to the consent order, the appellant is represented by Mr. Trotman in association with other counsel, namely Mr. Eversley. We refer to paragraph 4 of Mr. Grant's affidavit where he states:

"4. That I am informed and I verily believe it to be true that on the 14th October, 2015 Mr. Norris contacted Mr. Decoursey

Eversley, Attorney-at-Law who has been holding papers for Mr. Trotman since his wife's illness...."

This being the case, the appellant could have appeared through alternative counsel. Mr. Grant's affidavit does not condescend to provide any reason for Mr. Eversley's absence.

[35] Further, Mr. Grant deposed that he was also on certified medical leave. He is a director of the appellant. However, that certificate was not exhibited to the affidavit. It must be noted too that no communication was received by this Court as to the reason for Mr. Grant's absence on the date of hearing.

[36] In light of the above we conclude that the appellant has not provided a good reason for not attending.

***Condition 2 - It must be shown that it is likely that had the applicant attended some other decision might have been made***

[37] By condition 2, it must be shown that it is likely that had the applicant attended some other decision might have been made.

[38] It is beyond dispute that the appellant was in breach of the consent order made at the case management conference. As stated earlier, that order imposed an obligation on the appellant to file and serve skeleton arguments by a specified date, failing which it was required to file and serve a notice of discontinuance.

[39] The consent order was an unless order. The failure to comply with such an order can result in serious consequences for a litigant. As Sykes J stated in

**Forrester v Holiday Inn (Jamaica) (2005) No CL 1997/F-138:**

“An unless order is a peremptory order directing a party to the litigation to do a specific act, within a specific time, which, if not done, is visited by sanctions prescribed by the order. It is a fundamental principle that a litigant who fails to comply with such an order should suffer the penalty prescribed by the order unless he can show good reason why the stated consequences should not follow. A necessary corollary to this is that the litigant who seeks to extend the time within which to comply with an unless order must show good cause why this should be done.”

[40] **Rule 27.8(1)** gives a party who has not complied with an order to do something within a specified time the opportunity to obtain an extension of time. That rule provides:

"27.8(1) A party must apply to the court if that party wishes to vary a date which the court has fixed for

(a) .....

(b) a party to do something where the order specifies the consequences of failure to comply."

If the application is being made after that date, the party must apply for (a) an extension of time and (b) relief from any sanction to which the party has become subject under the **Rules** or any court order: See **rule 27.8(4)**.

[41] In our view, it was incumbent on the appellant, having not complied with the consent order, to apply to the Court for an extension of time or some form of

relief from the sanction expressed in the consent order. The default was brought to the attention of the appellant whose position was that it did not consider that its failure to comply with the consent order was material. No attempt was made by the appellant to avail itself of this provision, and indeed the affidavit evidence suggests that the appellant did not consider that it required any such relief.

[42] We need to advert to one other point. The appellant has complained that it attempted to file the record of appeal on 30 October 2015 but it was rejected by the Registrar of the Court of Appeal and that Mr. Trotman issued a letter requesting an explanation. The record shows that the Registrar responded to that correspondence by letter of 13 November 2015 where she (i) pointed out that the record was not in accordance with **Part 62.12(10)**; (ii) recommended that the record be further examined and if Mr. Trotman was not in agreement with that recommendation, the said record could be returned for filing. The record was not corrected by the appellant to bring it in conformity with the Registrar's order nor was the non-compliant record ever filed.

[43] We can therefore sum up the position as follows. A consent order had been made requiring the appellant to undertake certain acts with a sanction specified for failure to comply. Those acts were not done. The appellant did

not consider its non-compliance to be material. It did not apply for relief or for an extension of time. It is against this background that the appellant has argued that the Court should set aside its decision.

[44] Despite the arguments of counsel for the appellant, we are not persuaded on the available evidence that it is likely that there would have been some other decision if the appellant had attended.

[45] We therefore hold that the appellant has not shown that there was a good reason for not attending, nor has it shown that some other decision might have been made if it had attended.

*Condition 3 - The Court, after taking into account the circumstances including the position of the respondent to the application, and the merits of the appeal, shall make such order as appears to it to be just*

[46] In light of our findings above, the application can be disposed of. However, for the sake of completeness we turn now to the final condition, that is, that the Court must consider all the circumstances of the case, including the respondent's position and the merits of the appeal.

[47] The material before us painted a picture of an appellant who has continuously disregarded the **Rules** in its handling of its appeal, and has not complied with the consent order. The respondent's position to the application was carefully and skillfully outlined by Mr. Hamel-Smith SC.

That position is set out earlier in this judgment and it is unnecessary to repeat it here.

[48] As to the merits of the appeal, Mr. Trotman submitted that this case was the first one to arise out of the insolvency legislation, and that the issues raised in the appeal were complex. However, an examination of the judge's decision reveals that the case is a contract case which concerned ownership of a debenture. There is a separate set of proceedings involving the insolvency of the other party to this case, Grant Hotels Inc., which did not appeal the judge's decision.

[49] We note that the main argument relied on by the appellant concerns the suggestion that the legislation under which the judge who heard the matter in the High Court was admitted to practise law was defective. This issue was cast within the context of fresh evidence. However, Mr. Trotman quite properly conceded that such an application could not be dealt with at this stage of the proceedings and would have to be the subject of an appropriate application under **rule 62.23**. We would only add that in our view the fresh evidence on which the appellant seeks to rely does not appear to satisfy the requirements of the rule.

[50] In all the circumstances we have reached the conclusion that, since the appellant has not satisfied the requirements of **rule 62.21**, this Court's

discretion to set aside its decision should not be exercised in favour of the appellant.

**Disposal**

[51] The application is dismissed. The appellant shall pay the respondents' costs of the application to be assessed if not agreed.

Justice of Appeal

Justice of Appeal

Justice of Appeal