NMLS

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO: 70 OF 2004**

**APPLICATION NOS: 5, 14 & 26/2006**

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| **Between:** | **Auburn Court Limited** | **Appellant** |
| **and** | **The Town and Country Planning Appeal Tribunal** | **1st Respondent** |
| **and** | **The Town & Country Planning Authority** | **2nd Respondent** |
| **and** | **The Government Town Planner** | **3rd Respondent** |

**IN CHAMBERS**

**Earl Witter instructed by Gaynair & Fraser for Appellant**

**Patrick Foster & Miss Tasha Manley instructed by the Director of State Proceedings for Respondent**

**HARRIS J.A. (Ag.):**

**February 28 & March 28, 2006**

The following have been laid before the court for consideration:

(a) An application by the respondents to strike out the appeal; and

(b) An application by the appellant for enlargement of time to file the record of appeal.

On July 6, 2004, the Appeals Tribunal established under the Town and Country Planning Act, ordered that a building owned by the appellant be demolished and the land be restored to the state in which it had existed prior to the construction of the building thereon.

An appeal against the order of the Tribunal was filed on July 15, 2004. On July 27, 2004 the appellant obtained a stay of execution of the order.

On July 12, 2005 the appellant was notified by the Registrar of the availability of the transcript of the proceedings before the Tribunal. Time for filing of the record would have expired August 9, 2005 and the appellant was so informed. However, the preparation and filing of the record remained in abeyance. A notification in the form of a reminder with respect to the filing of the record was transmitted to the appellant on September 21, 2005.

The respondents, on January 27, 2006, filed their application to strike out the appeal. On February 24, 2006 the appellant filed its application.

The grounds on which the respondent relies are as follows:

"A. The Appellant has failed to comply with the procedural requirements for the filing of Appeals from the Section 2 of the Court of Appeal Rules which sets out the

procedure for the filing of appeals from the Supreme Court and in particular:

(i) The Appellant failed (sic) has failed to file Record of Appeal in within (sic) the time period stipulated in Rule 2.7(3) or any at all after receiving the Registrar's Notice under Rule 2.5(1)(c).

B. The protracted delay on the part of the Appellant in prosecuting its appeal amounts to an abuse of process of the Court."

Rule 2.7(3) of the Court of Appeal Rules 2002 requires an appellant to prepare and file 4 sets of the record of appeal within 28 days of the receipt of the notice under rule 2.5 (1)(b) or (c) or of the lodging of the transcript.

Under Rule 1.7 of the Court of Appeal Rules 2002, the court has general powers of management of cases. These powers are outlined in Rule 2.15. Rule 2.15 sets out those powers of the court which are additional to 1.7, including the authority to make "incidental decisions pending the determination of the appeal" under 2.15 (g) thereof.

The discretionary powers conferred on the court under rule 1. 7 (2) are extensive. It allows the court to enlarge or shorten time appointed by the rules to do an act or take proceedings. It empowers the court to grant enlargement of time notwithstanding an application is made subsequent to the expiration of time prescribed by the rules for compliance. Rule 1.7 (2) (b) reads:

> "Except where these rules provide otherwise, the court may:
> (a) . . .
>
> (b) extend or shorten the time for compliance with any rule , practice direction , order or direction of the court even if the application for an extension is made after the time for compliance has passed."

Rule 1.13 permits the court to strike out an appeal.

Rule 26.7 (2) of the Civil Procedure Rules 2002 (CPR), imposes sanctions for non compliance on a defaulting party unless he applies for relief from sanction. The rule states:

> "(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

Rule 26.9 of the CPR is not relevant for the purpose of this application.

A party may obtain relief from sanction by virtue of rule 26.8 of the CPR which provides as follows:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit
>
> (2) The court may grant relief only if it is satisfied that -

(a) the failure to comply was not intentional;
(b) there is a good explanation for the failure; and
(c) the party in default has generally complied with all other relevant rules, practice direction orders and directions.

(3) In considering whether to grant relief, the court must have regard to -

(a) the interests of the administration of justice;

(d) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party."

In exercising its discretion under the rules, the court is bound to give effect to its overriding objective. Although Rule 1.13 of the Court of Appeal Rules gives the court the power to strike out an appeal, in light of rule 26 .8 of the CPR it is incumbent on the court, after examining all the circumstances of a case, to determine how best to deal with it justly. The rules grant to the court wide

discretionary powers in dealing with matters. The justice of a case, requires, inter alia, the avoidance of prejudice, the saving of expenses, ensuring that cases are dealt with fairly and expeditiously and the allocation to the case an apposite share of the court's resources while considering the necessity to apportion resources to other cases. In considering each case the court must ascertain whether on the facts before it, the circumstances warrant a favourable or an unfavourable order for an appellant or a respondent.

In reviewing of the exercise of the court's discretion within the context of the overriding objective of the rules, in ***Buguzzi v Rank Leisure PLC*** [1999] 4 ALL ER page 934 at page 939, Lord Woolf said:

> "Under r 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.
>
> Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the

> court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.
>
> There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

In ***Purdy v Cambran*** (CAT December 17, 1999), May L. J formulated his view of the CPR in the following terms:-

> "The effect is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment considering all available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice of all the circumstances of the individual case."

Despite the power to strike out, it does not follow that the court's initial approach will be to apply the sanction of striking out. The

court will now adopt a more flexible approach than that which existed under the old rules. The powers of the court are now broader than those prior to the advent of the new rules and in many cases there are alternatives enabling the court to deal justly with a case rather than strike it out.

Mr. Foster argued that the delay in filing the record is protracted, the record has not been filed notwithstanding two reminders issued to the appellant's attorneys at law so to do and the appellant was only goaded into action subsequent to the filing of the respondents' application for the striking out of the appeal. He further contended that the reasons proffered by the appellant for the delay were inadequate and its conduct was an abuse of the process of the court.

Mr. Witter conceded that there was some delay on the part of the appellant in the pursuit of the appeal but submitted that the appellant's attorneys-at-law had proffered good reasons for the delay. It was his further submission that the fundamental issue for consideration by the court is whether the appellant intends to pursue the appeal.

Although the discretion of the court is unfettered, the crucial question is whether in the circumstances of this case, the discretion ought to be exercised in favour of the appellant or the respondents. In determining the issues arising in this matter, it appears to me that the

question is whether the appeal should be struck out for want of prosecution.

In paragraph 5 of the affidavit of Barrington Earl Frankson, attorney at law for the appellant, in support of the application, he advanced the following reasons for the delay in the filing of the record:-

> "(i) The transcript received by the Appellant was in State of disarray with several missing pages which had to be sorted out by the Appellant.
>
> (ii) That the Notice to the Parties as to the availability of the transcript was issued pursuant to Rule 2.5(1)(b)(ii) as a consequence whereof the Appellant took the view that Rule 2.7(2) of the Court of Appeal Rules applied to the instant appeal which requires the Respondents to inform the Appellant of any documents they wished to have included in the Record of Appeal as certain documents relevant to the Appeal were not delivered with the transcript.
>
> (iii) Further, I experienced an unusually heavy work schedule and Court appearances and had to be constantly outside the jurisdiction by making numerous visits to Canada to visit my mother who was hospitalized in that country from the 2nd day of September, 2004 to the 23rd day of December, 2005."

I will first consider the explanation advanced in relation to the missing pages of the transcript. It is clear that on July 12, 2005 a

letter was sent to Mr. Frankson by the Registrar informing him of the availability of the transcript. His affidavit is silent as to the date of its receipt by him.

It can be presumed that he received it sometime in July. Although he averred that pages were missing from the transcript, there ought to have been some evidence before this court demonstrating that some communication had been dispatched by him to the Registrar, seeking to obtain the missing pages. However, no correspondence has been exhibited to show that such request had been made.

I now turn to the explanation with respect to the non-compliance with Rule 2.7 (2) of the Court of Appeal Rules. Rule 2.7(2) reads:

> "Within 14 days of receipt of:
>
> (a) the notice under rule 2.5 (1) (b) or (c) ; or
> (b) the lodging of a transcript under rule 2.5 (3),
> all parties must inform the appellant of the documents that they wish to have included in the core bundle."

The respondents had not informed the appellant of the documents which they wished to be included in the record. However, an onus rests on the appellant's attorney at law, and not the respondent, to file the record of appeal. He failed to take the requisite step in this regard . Since it is obligatory on the part of the appellant

to have ensured that the record was submitted to the court within the time prescribed by rule 2.7.(1) (3), the appellant's attorney-at law ought to have sought the relevant information from the respondent . It cannot be said, however, that the respondents are not without blame.

I will now address the averment with respect to Mr. Frankson's heavy workload and his frequent absence from the island consequent on the hospitalization of his mother in Canada as factors which militated against his filing of the record within the time limited for so doing. Failure of an attorney-at-law to carry out such duties as are required by him by reason of work and personal difficulties may in some circumstances be a plausible excuse for non compliance with rules of court.

Mr. Foster argued, however, that the difficulties outlined by Mr. Frankson would not rank as a cogent excuse for his failure to file the record of appeal and in support of this contention he cited the case of ***City Printery Ltd v Gleaner Co., Ltd.*** (1968) 10 J.L.R 506. In that case a solicitor for an appellant after a 2 year delay brought before this court an application for an extension of time within which to file record of appeal, citing clerical changes in his staff and removal of his office as reasons for the belated application. Refusing the application,

the court held that the delay, for which no satisfactory account had been given, had been inordinate.

Mr. Witter submitted that the delay does not preclude the court from granting the relief sought by the appellant. Reliance was placed by him on the case of ***CVM Television v Tewari*** SCCA 46/2003 (unreported). In that case, the appellant's attorneys-at law sought and obtained an enlargement of time within which to file skeleton arguments, after a delay of 14 months, on the ground that the delay was due to oversight and a heavy work schedule. The appellant had done all that was required to be done by them save and except to file the skeleton argument within the prescribed time, which was filed and served before the hearing of the application for enlargement of time.

In ***C.V.M TV v Tewarie*** (supra) Harrison, J.A., as he then was, in addressing the matter of delay occasioned by the attorneys-at-law's failure to file the requisite document in time, said:

> "In the instant case, although the reason given for the delay, namely: ... due to oversight and the heavy work schedule ... was good but not altogether adequate, it is not entirely nugatory. The delay was not that of the respondent. The interest of the respondent not to be excluded from the appeal process due to the fault of his counsel, is an aspect of doing justice between the parties."

A reminder was sent to Mr. Frankson on September 21, 2005, which should have goaded him into action earlier. His failure to adhere

to the time table prescribed by the rules ought not to be laid at the appellant's feet. He had been tardy in the filing of the record. His explanation touching his personal difficulties as well as those pertaining to his workload contributing to his delay, though reasonable, is somewhat deficient but such explanation cannot be ignored. The non- compliance with respect to the filing of the record ought not to be regarded as being intentional on the appellant's part. The delay in seeking to remedy the default is not excessive. The just disposal of the case and the interest of the appellant are of manifest importance. The appellant should not be made to suffer by reason of his attorney-at-law's dereliction of duty. Further, the respondents have never informed the appellant of the documents they propose to have included in the record. This they were mandated to do.

It had not been suggested by the respondent that they had suffered any irreparable mischief. No undue prejudice would be encountered by them should the matter proceed to trial. Any difficulty or disadvantage which they might have suffered as a result of an order for enlargement of time could be remedied by the imposition of costs.

Justice though impeded by the delay will not be defeated, as the appellant's failure to comply with the rules can be remedied within a short time. To grant an extension of time would not require the adjournment of the hearing as a hearing date has not yet been fixed.

It is unlikely that a hearing date could be set for at least another month, should the record be filed. Any future hearing date fixed can be met.

The application to strike out the appeal is dismissed. Leave is granted to the appellant to file the record of appeal within 14 days of the date of this order.

Costs of $8,000.00 to the respondent.