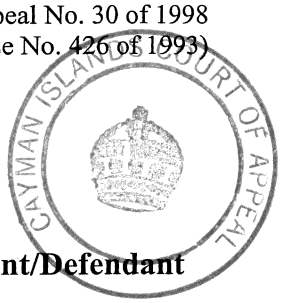
30-11-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 30 of 1998
(Grand Court Cause No. 426 of 1993)



BETWEEN:

GRAND CAYMAN GOLF RESORTS LTD.

Appellant/Defendant

- and -

EAST END AGGREGATE LTD.

Respondent/Plaintiff

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice G. Collett, Justice of Appeal
The Honourable Mr. Justice I. Rowe, Justice of Appeal

Kenneth Farrow instructed by Quin & Hampson for the Appellant.
George Giglioli instructed by Giglioli & Co. for the Respondent.

Heard: August 6th 2001

Reasons released: November 30th 2001

REASONS FOR ORDER

COLLETT, J.A.

The application before us was, in substance if not in form, one by the appellant for extension of time in which to comply with an earlier order of this Court made on April 5th 2001. That order required them, as a condition of maintaining this appeal, to pay to the respondent's attorneys, Giglioli & Co., on or before April 18th 2001 the sum of US $25,000.00, representing an estimate of costs thrown away by an adjournment of the full hearing of the appeal which had been fixed for April 5th.

The appellant had previously been represented in this litigation by other than its present attorneys, Quin and Hampson. Accordingly, the latter had not been present in court when the 'unless' order was made. Nevertheless, as they frankly admitted, they were subsequently made aware of its terms. On April 23rd 2001 they filed formal notice of change of attorney with the Court Registrar.

Prior to this, however, in an attempt to comply with the order of April 5th, the new attorneys as instructed by their clients, sent a cheque for $25,000.00 to the Registrar of the Court: it had escaped notice in their office that the terms of the order required them to pay Giglioli and Co. instead. For this unfortunate error the attorneys frankly accepted responsibility. Payment was within the permitted time. When that error was discovered the present application for extension of time was filed and came before the Chief Justice sitting as a single Judge of this Court, on June 26th 2001. But the Chief Justice directed that the matter be heard before the full Court, on account of the jurisdictional issues arising from non-compliance within the time permitted which had already expired.

We heard the application on August 6th 2001, including objections on the part of the respondent that we had, in the circumstances, no jurisdiction to grant the relief sought. Having satisfied ourselves that jurisdiction did subsist to do so, we exercised our discretion to grant the relief sought on terms and now disclose our reasons for so doing.

The objection raised by the respondents on account of alleged absence of jurisdiction rested upon the proposition that, so soon as the time limited for compliance with the Court's order had passed without strict compliance, the appeal had automatically become dismissed and that, in such a situation, there was no appeal remaining upon file which would enable the Court to grant an extension of time. The appeal in effect was 'dead' and the Court was '*functus officio*' in respect of it. Mr. Giglioli cited *Whistler v. Hancock* (1878) 3 Q.B.D. 83 in support of this general proposition and, while conceding that the actual decision in that case had been overruled in England by the Court of Appeal in *Samuels v. Linzi Dresses Ltd.*, [1989] 1 Q.B. 115, he maintained that the present circumstances could be distinguished in Cayman law and cited *Garren International Inc. v. Wight & Wight* 1984-85 CILR 324 as demonstrating this result.

The Grand Court decision was to the effect that after a judgment had been entered up in that Court, following a failure to comply with an ' unless order' requiring the defendant to perform some act within a limited period, the Court no longer had the power to extend that period for compliance; although until the entry-up of the judgment it could in its discretion have done so notwithstanding the expiry of the permitted period. Hull, J. felt able to so find because, in *Samuels v. Linzi Dresses*, the entry up of judgment had been postponed by agreement of the parties pending the delivery of judgment by the Court of Appeal.

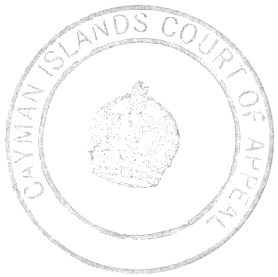
Superficially, this line of argument appeared to have some merit, but a careful reading of *Samuels v. Linzi Dresses* discloses no hint by any of the Lords Justices of any such distinction as was drawn by Hull, J. in *Garren International*. Rather the emphasis was upon the discretion of the Court and the concept of an action being 'dead' was disapproved. At p. 127D, Lawton, L.J. said – "The concept of the action being dead is one which does not fit in … with the modern approach to striking out for want of prosecution." At p.126H, Roskill, L.J. said – "In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously…."

In our view that is also the modern law of the Cayman Islands, so that, in so far as the decision in *Garren International* rests upon a principle that a court no longer has power to extend time after a judgment has been entered up, it cannot any longer be regarded as good law. We are satisfied that we have in the present case a discretion to extend time but we are also conscious that this discretion should be exercised cautiously, as Roskill, L.J. has pointed out.

We are urged by counsel for the respondent here to exercise that caution by refusing the present application in our discretion so as to maintain the sanctity of court orders. Had we been satisfied that the respondent have suffered any real prejudice from this purely technical error on the appellant's present attorneys, we might have been disposed to give weight to that submission. However, it is evident that they have not. The full amount ordered had been secured in Court since the period originally fixed for compliance and the applications now made provision for an immediate payment out of Court to the respondent's attorneys together with accrued interest.

Insofar as any further interest might have been earned, had the money not rested in Court, the appellant's attorneys have undertaken to make up the shortfall disclosed.

In these circumstances there is no real basis for refusal to exercise the discretion which we have held resides in this Court. Accordingly we announced at the end of the hearing on August 6th that the application would be granted on terms, the respondent to have its costs of the application in any event. Hearing of the substantive appeal was adjourned by consent to the next session of this Court.



Zacca P.

Collett, J.A.

Rowe, J.A.