



Neutral Citation Number: [2020] CA (Bda) Civ 17

Case No: Civ/2021/3

**IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS  
ORIGINAL CIVIL JURISDICTION  
THE HON. CHIEF JUSTICE HARGUN  
CASE NUMBER 2015: No. 430**

Sessions House  
Hamilton, Bermuda HM 12

Date: 26/11/2021

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE  
JUSTICE OF APPEAL SIR MAURICE KAY  
and  
JUSTICE OF APPEAL GEOFFREY BELL**

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**Between:**

**GAYLE ANN VENTURES**

**Applicant**

**- v -**

**CLARIEN BANK LIMITED**

**Respondent**

Mr Cameron Hill (Westwater Hill & Co.) for the Applicant  
Mr Kevin Taylor (Walkers (Bermuda) Limited) for the Respondent

Hearing dates: Matter determined on the papers.

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**APPROVED RULING**

CLARKE P.:

1. By a Notice of Motion of **4 November 2021**, purportedly made in Civil Appeal No 3 of 2021 by Ms Gayle Ventures (“Ms Ventures”), as appellant, Ms Ventures seeks an order that the conditions set by the Registrar pursuant to Order 2 Rules 9 and 10 be waived and/or that an extension of time for compliance be granted.
2. In order to understand the nature and context of the application it is necessary to set out in a little detail the history of the matter.
3. The first instance hearing before the Chief Justice took place on **20 and 21 October 2020**. On **22 January 2021** he gave judgment against Ms Ventures. On **2 March 2021** she appealed that judgment.
4. On **24 March 2021** the Registrar made an order giving directions in relation to the Appeal pursuant to Order 2, Rules 7 and 8 (“**the Appeal Directions Order**”). This included provisions (a) that the hearing fee and the fee for forwarding of the record in the sum of \$500 should be paid on or before 1 April 2021, and (b) that Ms Ventures should pay \$5,000 into her counsel’s trust account within 21 days as security for the costs of the appeal. The cost of the Record is dealt with in Order 2, Rule 9, and Security for Costs is dealt with in Order 2 Rule 10.
5. Neither of the provisions of the Appeal Directions Order to which I have referred were complied with by the time stated, or at all.
6. On **20 April 2021** the Respondents applied for the appeal to be dismissed pursuant to Order 2, Rule 17 (1). On **23 April 2021** Ms Ventures filed a Notice of Motion seeking an order that the conditions of the Appeal Directions Order be waived or that an extension of time for compliance be granted (“**the Appeal Directions Relief Application**”).
7. On **29 April 2021** the matter came before Bell J.A. He declined to grant the relief sought in the Appeal Directions Relief Application. He also declined to entertain an application, made for the first time orally at the hearing before him, for liberty to proceed as a poor person and directed that, if any such application was to be pursued, the Appellant would need to file a Notice of Motion.
8. On **30 April 2021** Bell J.A. dismissed the appeal pursuant to Order 2, Rule 17 (1), having received from the Registrar the certificate of non-compliance specified by that Rule, signed by her on 29 April 2021
9. Ms Ventures then made the following applications to the Court of Appeal:
  - (a) to restore the appeal pursuant to Order 2 Rule 17 (4);
  - (b) for an order pursuant to Order 5 Rule 1 and/or the inherent jurisdiction of the Court that the conditions set by the Registrar should be waived, or that an extension of time for compliance be granted; “**the Renewed Appeal Directions Relief Application**”);

- (c) for an order pursuant to Order 2 rule 33 declaring that she may proceed with the appeal as a poor person (“the **Poor Person Application**”), which, if successful, would mean that she would not be obliged to make the deposit or to give the security provided by Order 2 Rules 9 and 10.

10. Order 2 Rule 17 provides:

*“(4) An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the Court and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit”.*

11. The matter came before a Court consisting of myself, Kay JA and Bell JA, on **17 June 2021**, when we heard substantial argument. On **3 September 2021** our judgment was handed down by Bell J.A. In it, after setting out the terms of Order 2 Rule 17 I said:

*“70. I am not persuaded that there is good and sufficient cause why we should order that the dismissed appeal should be restored because it does not in my view have a reasonable prospect of success.*

*71. In those circumstances neither the Renewed Appeal Directions Relief Application nor the Poor Person Application arise for decision. As to the former Mr Hill indicated that he might be prepared to finance the appellant in the sum of \$ 5,000 but had reached no final decision on that and invited the court to make an order that unless the sums due were paid within a short period of time (a matter of days), the appeal would not be restored. In relation to the latter. Order 2 Rule 33 provides that “no party shall be permitted to proceed as a poor person unless he satisfies the Court that he had a reasonable probability of success”. I do not think that the Court can be so satisfied unless it takes the view that the chances of success exceed 50%. As is apparent from what I have said in the previous paragraph I am far from so satisfied.*

*72. In those circumstances, I would not restore the appeal, which must stand dismissed.”*

12. In a letter of 4 November 2021 Mr Hill for Ms Ventures submits that Ms Ventures’ right to have the appeal restored upon payment of security for costs and the court fee was not determined by the court in the September judgment, and should now be determined. He also submits that Order 5(1) does not require that the appellant should show that she has a reasonable prospect of success.
13. In my judgment these submissions are misplaced. The first, and primary, matter, for our determination in September was whether the dismissed appeal should be restored. We determined that it should not, because there was no good and sufficient reason to do so. There

is, therefore, now, no extant appeal. We did not determine whether the Register's directions should be varied because, in the light of our conclusion on restoration (viz that the appeal should not be restored) there was no extant appeal to which those directions could relate.

14. Order 5/1 reads as follows:

***“5/1 Waiver of non-compliance with rules***

*Non-compliance on the part of an appellant with these Rules or with any Rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court consider that such non-compliance was not wilful, and that it is in the interests of justice that non-compliance be waived. The Court may in such manner as they think right, direct the appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given.”*

15. This is a rule which applies to an extant appeal. If the appeal has been struck out there is no existing appeal which may be further prosecuted, or which can proceed. The Rules lay down a clear rule that, if none of the requirements of Order 2 Rules 9 and 10 have been complied with, the appeal is to be struck out, subject to the power to restore it if the Court is minded to exercise its discretion to do so for good and sufficient cause. In determining whether there is a good and sufficient cause the Court is entitled to consider the merits and decline to exercise its discretion if it is not satisfied that there is a reasonable prospect of success. If there is such a prospect, the question whether there is good a sufficient cause to restore the appeal is likely to depend on the egregiousness of the failure to comply with Rules 9 and 10 and the reason for such failure. Since we decided that there was no such prospect it became unnecessary to consider whether there should be an extension of time.
16. What, as it seems to me, is not permissible is to invoke Order 2 Rule 17 (4) and then, when the Court has decided not to exercise its discretion to restore the appeal under Order 2 Rule 17 (4), to seek to have the appeal restored, relying on Order 5 Rule 1, asserting a lower test in relation to the merits than that prescribed by Order 17 Rule (4), pursuant to which the dismissed appeal was not restored in the first place.
17. This exercise would involve a reworking of the arguments that were before us in June in relation to the Asset Transfer Agreement and which were dealt with at paragraphs [57] – [60] of our judgment.
18. Bell JA dismissed the appeal. The Full Court has refused to restore it. We are now, in my view, *functus officio*.
19. In those circumstances the motion is dismissed.

KAY, J.A.:

20. I agree

BELL, J.A.:

21. I, also, agree.