

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 7/07

APPLICATION NO: 9/07

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.  
THE HON. MR. JUSTICE COOKE, J.A.  
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN	ABDULLA C. MARZOUCA LIMITED	1 <sup>ST</sup> APPELLANT
A N D	ABDULLA C MARZOUCA	2 <sup>ND</sup> APPELLANT
A N D	CHARLES H. CROOKS	RESPONDENT

Paul Beswick instructed by G. Anthony Levy & Co. for the applicants/ appellants

Daniella Gentles instructed by Livingston Alexander & Levy for the Respondent

26<sup>th</sup>, 27<sup>th</sup> February, 6<sup>th</sup> March and May 11, 2007

SMITH J.A.

This case arose out of a claim by the respondent for monies loaned to the first appellant by the respondent, the repayment of which was guaranteed by the second appellant.

On March 27, 2006, at a Case Management Conference, a number of orders were made including:

- "(a) Standard Disclosure of all documents on or before the 10<sup>th</sup> May, 2006.
- (b) Inspection of all documents by the 24<sup>th</sup> May, 2006.
- (c) Witness Statements to be filed and exchanged on or before the 7<sup>th</sup> June, 2006.

- (d) The First Defendant is to file and serve its Defence on or before the 14<sup>th</sup> April, 2006.
- (e) Listing Questionnaire to be filed on or before the 19<sup>th</sup> September, 2006.
- (f) Pre-Trial Review to be heard on the 25<sup>th</sup> September, 2006 at 12:30 p.m. for half an hour.
- (g) Trial fixed for the 25<sup>th</sup> and 26<sup>th</sup> days of January, 2007."

The respondent's attorneys-at-law complied with all the orders made.

At the Pre-trial Review on September 25, 2006 neither the appellants nor their representative appeared and none of the orders made at the Case Management Conference was complied with save for the filing of a Defence. The Pre-trial Judge, Daye J, made an Unless Order in the following terms:

"UPON this matter coming on for Pre-trial Review this day and upon hearing Miss Daniella R. Gentles, Attorney-at-law instructed by the firm Livingston, Alexander & Levy, Attorneys-at-law for and on behalf of the Claimant AND UPON the Defendants not appearing nor being represented IT IS HEREBY ORDERED that:-

1. The Defence of the Defendants be struck out and Judgment entered for the Claimant as claimed, unless the Defendants comply with the Case Management Conference Orders made on the 27<sup>th</sup> day of March, 2006. within fourteen (14) days of the date hereof.

BY THE COURT

---

JUDGE"

On September 27, 2006, a formal Order was prepared and served on the Attorney-at-law for the appellants. The appellants did not comply with the "Unless Order" and, as a consequence judgment was filed on November 7, 2006, as follows:

"The Defence of the Defendants be struck out and judgment entered for the Claimant in the sum of US\$310,582.19 together with interest on the sum of US\$300,000 at the rate of 12.5% per annum from the 13<sup>th</sup> November, 2003 to the date of payment and costs."

On December 19, 2006, Marjorie Cole-Smith J, commenced hearing an application by the appellants for relief from sanctions and for an order that the judgment entered in default be set aside. On June 4, 2007, Cole-Smith J, dismissed the appellants' application and ordered costs to be paid to the respondent. On January 15, 2007, the appellants filed and served a Notice of Appeal against the Order of Cole-Smith, J. When this matter first came before this Court there were two applications before us:

- (i) The appellants' application for a stay of execution, which was first in time; and
- (ii) the respondent's application to strike out the appeal.

During the hearing of the applications the Court permitted Mr. Beswick, Counsel for the appellants, to file the following as a third application:

- (iii) an application for an extension of time within which to file the Notice of Appeal.

### The Application to Strike Out

The submissions of Ms. Gentles for the respondent/applicant, stated briefly, are that this appeal has nothing to do with the substantive issues and therefore is procedural. As a Procedural Appeal, the Notice of Appeal must be filed within 7 days of the date of Cole-Smith, J's, order. Ms. Gentles pointed out that the order was made on January 4 and the Notice of Appeal filed January 15, 2006, that is to say, 11 days after the Order. Thus, she argued, the Notice was filed out of time. She asked the Court to strike it out. Mr. Beswick for the appellants responded in this way:

Firstly, the appeal is not by definition a Procedural Appeal as the Order being appealed is one which completely decided the outcome of the action and therefore the substantive issue in this action.

Secondly, the appeal being from an Order in Chambers requiring leave falls under the rubric of Rule 1.11 (1) (b) of the Court of Appeal Rules which provides for 14 days for the filing of the Notice of Appeal.

Thirdly, in any event, the Court has the discretion to extend the time for the appeal and if it is held that the appeal is a procedural one the period elapsed between the time for filing set out in Rule 1.11(1) (a) and the actual date of filing *de minimis* the Court will be asked to extend the time to the actual date of filing of the Notice of Appeal.

Rule 1.1(8) of the Court of Appeal Rules defines "procedural appeal " as:

"an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes:

- (a) any such decision made during the course of the trial or final hearing of the proceedings;
- (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;"

The first question therefore is, what are the substantive issues in the claim? The claim is for repayment of monies loaned to the 1<sup>st</sup> Appellant which was guaranteed by the 2<sup>nd</sup> Appellant. The loan is evidenced by a promissory note. I have not seen a copy of the appellants' defence filed. However, according to the submissions of Miss Gentles on this aspect, which have not been challenged, it seems that based on the defence filed, the main issues are:

- (a) whether or not the respondent was in the business of money lending particularly the lending of foreign currency without being authorized contrary to the Bank of Jamaica Act and whether or not the respondent lent money at an excessive rate of interest contrary to the Money Lending Act; and
- (b) was the Guarantee supported by adequate consideration.

I agree entirely with Miss Gentles that this appeal has absolutely nothing to do with the substantive issues in the claim. The appeal concerns the decision of Cole-Smith, J not to grant the appellants' application for relief from the sanction for their failure to comply with the Unless Order of Daye, J made at the Pre-Trial Review. There has been no hearing of the substantive issues. In my view, by no stretch of the imagination can it be said that the decision of Cole-Smith, J directly decided the substantive issues in the claim. Her decision does not fall within any of the orders excluded from the definition of procedural appeal. I would therefore hold that the appeal from the decision of Cole-Smith, J is purely procedural.

The next question concerns the time for filing the Notice of Appeal. Rule 1.11(1) of the Court of Appeal Rules 2002 provides:

"The Notice of Appeal must be filed at the Registry and served in accordance with Rule 1.15 –

- (a) in the case of procedural appeal within seven (7) days of the date of the decision appealed against was made;
- (b) where permission is required within fourteen (14) days of the date when such permission was granted.
- (c) ..."

Mr. Beswick, in a valiant effort, sought to argue that if the Court finds that the decision appealed did not dispose of the substantive issues between the parties, then it should be treated as an interlocutory

judgment. In that event, he submitted, leave of the Judge or of the Court of Appeal would be necessary by virtue of s. 11(1)(f) of the Judicature (Appellate Jurisdiction) Act. Therefore, he argued, leave was required, to appeal from the decision of Cole-Smith, J. If leave is required he submitted, then the Notice of Appeal must be filed in accordance with Rule 1.11(1) (b) (supra). The Notice of Appeal must be filed within 14 days of the date when such permission was granted. Accordingly, he said, the Notice of Appeal was filed in time and is valid. I cannot accept this contention. Once it is accepted that the appeal is procedural as defined by Rule 1.1 (8) then Rule 1.11 (1) (a) applies and Notice must be filed within 7 days.

Rule 1.11(1) (b), in my view, applies to those orders specifically excluded from the definition of "procedural appeal" and where permission is required for example an order granting an interim injunction or declaration.

### **Extension of Time**

In the alternative, Mr. Beswick on behalf of the appellants seeks permission to file the Notice out of time. He refers to Rule 1.7(2) (b) of the Court of Appeal Rules which reads:

"1.7 (2) 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;
- (c) ..."

Miss Gentles for the respondent told the Court that, although she is not consenting to such an order, she will not oppose the application to extend time.

Counsel in his affidavit sets out the reason for filing the Notice beyond the seven days but within 14 days. It was based on Counsel's understanding of Rule 1.11(1). I agree with Mr. Beswick that the breach is not an egregious one. It has resulted in a delay of five days.

### **Conclusion**

The Notice of Appeal was filed out of the time prescribed for Procedural Appeals. However, in my judgment this is a fit and proper case for the Court in the context of the overriding objective to exercise its discretion and enlarge the time. Accordingly, time for filing the Notice of Appeal is extended to the 16<sup>th</sup> January, 2007 as prayed. Costs of these proceedings to be costs in the appeal.

### **COOKE, J.A**

I agree and have nothing further to add.



**HARRISON, J.A.**

I too agree and have nothing to add.

**SMITH, J.A.**

**ORDER:**

The time for filing the Notice of Appeal is extended to the 16<sup>th</sup> January, 2007 as prayed. Costs of these proceedings to be costs in the appeal.