[2014] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 27/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**ALCRON DEVELOPMENT LIMITED**	**APPLICANT**
AND	**PORT AUTHORITY OF JAMAICA**	**RESPONDENT**

Mrs Shawn Wilkinson instructed by Wilkinson and Co for the applicant

Kevin Powell instructed by Michael Hylton and Associates for the respondent

7 October, 19 December 2013 and 17 February 2014

HARRIS JA

[1] I have read, in draft, the respective reasons for judgment of my brother Brooks JA and my sister Lawrence-Beswick JA (Ag). I am in agreement with my brother Brooks JA in respect of the reasons he has given for the refusal of the application and his conclusions thereon.

BROOKS JA

[2] I have had the privilege of reading, in draft, the judgment of my learned sister, Lawrence-Beswick JA (Ag). Unfortunately, we are at variance on our conclusions in respect of the application made in this matter by Alcron Development Limited. We heard the application on 7 October 2013, and after consultation, the court delivered a majority decision on 19 December 2013 as follows:

> "1. The application for extension of time is refused.
>
> 2. Costs to the respondent to be taxed if not agreed."

At that time we promised to deliver our reasons in writing at a later date. We do so now.

[3] Alcron's application was for an extension of time in which to file and serve a notice and grounds of appeal. It sought an opportunity to move this court to set aside a decision of P A Williams J handed down on 27 January 2012. In that decision the learned judge ruled that there was no binding agreement for sale between Alcron and Port Authority of Jamaica (Port Authority) in respect of land situated at 71 Marcus Garvey Drive in the parish of Kingston. The learned judge also decided that arbitration proceedings between the parties, concerning that land, had been properly constituted and conducted. As a result, she authorised Port Authority to enforce the arbitration award that had been handed down on 1 December 2008.

[4] In accordance with rule 1.11(1)(c) of the Court of Appeal Rules (CAR), Alcron should have filed its notice and grounds of appeal on or before 3 April 2012, it having

been served with the formal order of the judgment on 20 February 2012. It did not do so. Almost a year passed before it filed the present application, which was filed on 18 March 2013. It attributed its failure to comply with this aspect of the CAR, to impecuniousity and the death of Mr Elworth Williams, who it described as its "chief principal" and its "face". The main issue to be decided in this application is whether Alcron has satisfied the now, well established criteria for the grant of permission to file a notice and grounds of appeal after the time prescribed by the CAR. Before assessing that issue, however, an outline of the events which led to Williams J's decision will be set out.

The background facts

[5] Port Authority is the registered proprietor of the land at the centre of the dispute. On 31 December 1980, it leased the land to Alcron for a term of 49 years. By February 2004, however, differences had developed between them and Port Authority filed a claim in the Resident Magistrate's Court for recovery of possession of the land. They subsequently agreed, as the lease had stipulated, to refer their dispute to arbitration and the claim was, some time later, adjourned to facilitate the arbitration.

[6] Wright JA (then retired) was appointed as the arbitrator. The issue which he was to decide was:

> "Whether the [Port] authority is entitled to possession of the leased premises as described in the lease."

Before the arbitration had got under way, however, Wright JA fell ill and died.

[7] Steps were taken to have Langrin JA (also then retired) to replace Wright JA. Both parties were happy with Langrin JA. On or about 23 November 2006, Langrin JA accepted the appointment and wrote to the parties setting out his terms for conducting the arbitration, including prescribing his fees. Up to June 2008, he had not been favoured with a response to his letter. It appears that the parties were, during that time, attempting to negotiate an agreement for the sale of the land to Alcron. They failed to agree on the price.

[8] When their negotiations proved fruitless, Port Authority pressed for the arbitration to proceed. Alcron did not, however, agree for it to proceed on the original issue only. It wanted to have included, as an issue, the fixing of a purchase price. The parties disagreed on this point and, at Port Authority's insistence, 31 October 2008 was fixed for the arbitration to proceed. Alcron was duly notified of that date.

[9] Alcron rejected that approach and, on 30 October 2008, it filed a claim in the Supreme Court. In that claim it sought, among other orders, declarations that there was a binding agreement between the parties for the sale of the land and that the price should be fixed by the mechanism set out in the lease agreement. It also sought an injunction to prevent Port Authority from proceeding with the arbitration. No injunction was, however, granted.

[10] Having initiated its preferred method, Alcron did not attend the arbitration. Langrin JA conducted the proceedings despite its absence and despite the fact that

there had been no agreement by both parties as to his fees. He handed down his award on 1 December 2008.

[11] Alcron amended its claim on 25 November 2010. In its amendment it sought, in addition to the orders previously mentioned, a declaration that the arbitration proceedings were null and void. It complained in the amended claim, that the arbitrator had not been properly appointed and, in the alternative, that what should have been the issue to be arbitrated was the mechanism for ascertaining the sale price for the land. It is the amended claim which proceeded before Williams J on 12 January 2011, and which was the subject of her decision mentioned above.

[12] Curiously, on 11 January 2011, the day before the amended claim was to be tried, Alcron filed another claim in the Supreme Court. In that claim it sought, as its main remedies, declarations that:

a. There was a joint venture between itself and Port Authority for the development of the land.
b. Port Authority had leased the land to it pursuant to the joint venture.
c. It had spent the equivalent of US$5,056,179.78 in pursuance of the joint venture.
d. Port Authority should pay to it the sum of US$5,056,179.78 or its equivalent in Jamaican dollars or

> credit it with that sum in relation to any agreement between the parties for the sale of the land.

In April 2012, Port Authority applied to strike out that claim. Its application was heard by Sykes J on 24 May 2013. On 3 June 2013, Sykes J struck out the claim "as an abuse of process on the ground that the matter was already decided between the parties". By then Williams J's decision had already been delivered and it is to that decision that Sykes J referred.

The applicable principles

[13] The criteria for assessing applications such as Alcron's, were clearly set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999). Panton JA (as he then was) stated them at page 20 of the judgment in that case. He said:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

Although **Leymon Strachan** was decided prior to the promulgation of the CAR, the criteria set out by Panton JA have been accepted as still being relevant in the current regime. Among the cases in which they have been cited with approval, is **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23.

[14] Alcron's application will be assessed against those criteria.

The analysis

a. The length of the delay

[15] Alcron does not seek to argue that the delay in filing its application is not lengthy. On its behalf, Mrs Wilkinson, asked the court to focus instead on the reasons for the delay. She pointed out that delay, by itself, will not be determinative of an application of this type. Mr Powell, on behalf of Port Authority, argued that the delay is lengthy and inordinate.

[16] Both counsel are correct in those submissions. Mrs Wilkinson's submissions are supported by authority. In **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6, K Harrison JA pointed out that the court will take into account all the factors in each case. It is implicit in Harrison JA's

reasoning that the length of the delay, although not, by itself, determinative of the application for extension of time, is not a minor element in its assessment. The learned judge of appeal pointed out that the "time requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed" (paragraph [25]).

[17] The delay in this application, being 349 days after Alcron should have filed its notice of appeal, is, despite Mrs Wilkinson's submission to the contrary, clearly inordinate. It must be considered as being in flagrant flouting of the relevant rule in the CAR and must be held against Alcron in this assessment.

b. The reasons for the delay

[18] In his affidavit in support of Alcron's application, Mr Roy Williams deposed to two main factors, which he said, had caused the delay. The first was that Mr Elworth Williams had "suffered a stroke in 2010 and had other health problems". He said that Mr Elworth Williams did not recover from his illness and died on or about 3 November 2012. According to Mr Roy Williams, the illness had two significant effects on Alcron:

a. It spent the resources that it had "in covering the medical, and other, expenses of the said Elworth Williams".

b. Its ability to earn income and to access financing was seriously impaired.

The latter effect was because Mr Elworth Williams "was generally seen or identified as the 'face' of [Alcron]".

[19] Despite the fact that Mr Elworth Williams was said to be integral to Alcron's operation, it did manage to operate without him in respect of the litigation. It is to be noted that during his illness, Alcron not only filed and prosecuted the claim which Sykes J decided, but pursued the claim, which is the subject of this appeal.

[20] The second major factor to which Mr Roy Williams referred was that although Alcron wished to appeal against Williams J's decision, it lacked the finances to instruct its attorneys-at-law to do so. He said that it owed those attorneys-at-law "a significant sum in legal fees" and the attorneys-at-law were not prepared to proceed further without those fees being paid. Mr Roy Williams deposed that it was only after negotiating an agreement with the attorneys-at-law in March 2013 that they were prepared to continue to represent Alcron.

[21] Alcron's explanation for the delay boils down to impecuniosity. Although in **Leymon Strachan** this court accepted impecuniosity as a plausible reason for a delay in filing a notice of appeal, the circumstances in that case were quite different from those in the present application. Firstly, unlike Mr Strachan, Alcron is a corporate entity with shareholders and directors. Those persons could have been approached for additional financing for the business of the company. The directors are also functionaries through whom Alcron may act in complying with the rules. Alcron does not bear the limitations that an individual litigant, such as Mr Strachan, would have. Secondly, Mr Strachan had demonstrated to the court that the litigation in which he was

involved was lengthy and complicated, involving several appearances both in this court and in the court below. Those circumstances do not exist in the present case.

[22] I do not consider Alcron's explanation acceptable. As in **Arawak Woodworking**, Alcron has failed to support its claim of impecuniosity with any concrete evidence. The deponent in **Arawak Woodworking**, as Mr Williams has done in this case, merely stated that the applicant company was impecunious. The history of the applicant company in **Arawak Woodworking** showed that it was in financial difficulty. Nonetheless, at paragraph [20] of his judgment in that case, Harrison JA stated as follows:

> "The applicant in the instant case, had failed in our view, to provide this court with a full and proper explanation as to why there was delay in filing the notice of appeal by some 114 days, or at the very best 54 days after leave was granted to appeal the decision of the learned Master."

It must be remembered that Alcron filed its application just shy of a year after it should have filed its notice of appeal. Mrs Wilkinson's submission that the reason for the delay is a good one, cannot be accepted.

c. Whether there is an arguable appeal

[23] Although Alcron did not provide a good reason for its failure to comply with the rules, that by itself, is not fatal to its application (see **Finnegan v Parkside Health Authority** [1998] 1 All ER 595). Its claim to an arguable case for an appeal is, nonetheless, also ill-founded. Its ultimate aim is to secure a declaration that it is entitled to purchase the land from Port Authority. A critical element of Williams J's

judgment in this regard, is that there was no agreement between the two for the sale of the land. The learned judge reasoned that the parties had not agreed on an essential ingredient without which there could be no binding agreement. That element was the sale price.

[24] Williams J cited **May and Butcher Limited v The King** [1934] 2 KB 17n; [1929] All ER Rep 679 in support of her analysis on this aspect of the issue before her. The headnote of the latter report accurately states that in the absence of an agreement as to the price of the item to be sold, there can be no binding contract. It states:

> "**the price for the [product to be sold] not having been agreed on between the parties, there was no binding or concluded contract**, and there being a stipulation in the agreement that the price should be agreed, it could not be implied that the price was to be a reasonable price." (Emphasis supplied)

[25] In the present case, the parties were negotiating the terms of a sale but had not agreed on a sale price or a means of determining that price. Williams J pointed out that the lease agreement spoke about a means of ascertaining a price in the event that Port Authority had granted Alcron an option to purchase the land. The relevant clause was quoted at paragraph [9] of her judgment. It stated as follows:

> "5.[3] Although the Landlord has the power under the act [sic] to sell land owned by it within the Free Zone it is not the present policy of either the Minister or the landlord [sic] that such lands be sold but if at anytime [sic] during the term of this lease or any renewal or extension thereof the Minister should amend, vary or alter such policy so as to allow and permit the landlord [sic] to sell such land or the leased premises should cease to be within the Free Zone and the

> Landlord in either case agrees and determines that the leased property be sold then in those circumstances the Landlord shall grant an option to the Tenant to purchase same .... [sic] the Landlord shall sell the leased premises to the Tenant with the purchase price being the unimproved value of the leased premises at the time of the exercise of the option as determined either by the Commissioner of Lands or by the Commissioner of Land Valuations..."

[26] Alcron cannot, however, rely on the methods of determining the sale price that are set out in the lease. Those methods were contingent on the grant and exercise of an option for sale. The documentation does not reveal that any option was granted or was exercised. It should also be remembered that these negotiations ensued after the act of re-entry by Port Authority by virtue of its claim filed in the Resident Magistrate's Court.

[27] The correspondence between the parties revealed instead, that the parties were negotiating the terms of a sale but could not agree on a price. Williams J examined that correspondence in her judgment. The parties were both of the view during those negotiations, that accord in respect of the price was critical to arriving at an agreement. Various methods of ascertaining a price were suggested, attempted and rejected. In the absence of success in settling on a price, Williams J was, therefore, correct in concluding that there was no binding agreement for the sale of the land.

[28] Alcron's complaint about the arbitrator proceeding in its absence is also ill-fated. It must be remembered that it was Alcron that requested that the Resident Magistrate's Court defer its jurisdiction to the arbitration clause in the lease agreement. Alcron had

agreed on the original issue to be resolved by arbitration. It was informed in advance of the date set for the arbitration. It could not, properly, decline in those circumstances, to attend and participate in the arbitration proceedings. There was, of course, no injunction to prevent the arbitrator proceeding and clause 7 of the lease, as quoted by the learned judge, permitted the arbitrator to proceed in the absence of a party who had improperly absented itself.

[29] Finally, in respect of the issue of an arguable case on appeal, Alcron's complaint that Langrin JA was not properly appointed as the arbitrator was properly dismissed by Williams J. Alcron's point in this regard, was that Langrin JA's fees had not been agreed by both parties. In those circumstances, it argued, Langrin JA's conditions for accepting appointment as arbitrator had not been fulfilled. Williams J, in rejecting Alcron's argument, properly pointed out that it had agreed on Langrin JA being the arbitrator. The learned judge, quite properly, cited Russell on Arbitration as authority for the principle that in the absence of an express agreement about the arbitrator's fees and expenses, it was implied that the parties had undertaken "to pay reasonable remuneration for his services" (paragraph [75] of the judgment).

d. The degree of prejudice to the other party

[30] In considering the issue of prejudice, Mrs Wilkinson argued that Port Authority would suffer no real prejudice if permission to appeal were granted. Dr Carol Pickersgill, on behalf of Port Authority, did, however, depose to the contrary. Dr Pickersgill stated, in July 2013, that Port Authority had recovered possession of the land

and was in the process of clearing it. The effect of that development is that Port Authority would have altered its position, having incurred expenditure in respect of the land. Dr Pickersgill did not give any evidence of the amount of the expenditure. It is unlikely, however, that any of that expenditure is directly recoverable. Its alteration of its position could not be compensated by an order for costs as these expenses were not directly associated with the litigation.

[31] Mrs Wilkinson is not correct on this aspect of her submissions.

e. the decision that justice requires

[32] The principle of dealing with the case justly impels me to the conclusion that this application ought to be rejected. In addition to the lack of merit mentioned above, a significant factor of Alcron's situation also militates against this application being granted. In his affidavit in support of the application, Mr Roy Williams made it clear that Alcron is still in severe financial straits.

[33] In paragraph 6 of his affidavit filed on 18 March 2013, he pointed to Alcron's difficulties in raising funds. He said in part, that it had "tried for some time to raise funds without luck as [its affairs] suffered **and have continued** to suffer" (my emphasis). Mr Roy Williams has not said that Alcron has overcome those difficulties. He has stated that it has negotiated an agreement with its attorneys-at-law but he has not demonstrated that Alcron would be able to purchase the land if given the opportunity, much less to satisfy an order for costs that would most likely be made against it in respect of this application, even if it were granted the extension sought.

Conclusion

[34] Alcron has failed to satisfy the criteria which have been established for granting an extension of time in which to file a notice of appeal. The reasons are as follows:

a. its delay in filing its application was unduly long;

b. its reason for the delay, based as it was, on impecuniosity, which was not convincingly demonstrated, is unacceptable; and

c. it has not shown that it has an arguable appeal.

As a result, its application should be refused.

[35] It is for those reasons that I agreed with the orders set out at paragraph [2] above.

LAWRENCE-BESWICK JA (Ag) (dissenting)

[36] This is an application for an extension of time to file a notice of appeal and grounds of appeal. On 27 January 2012 judgment was delivered in the court below in favour of the Port Authority of Jamaica (Port Authority) declaring that there was no binding agreement between it and Alcron Development Limited (Alcron) for the sale of certain property. The judgment was served on 20 February 2012. On 18 March 2013, almost a year after the time for filing the appeal had expired, Alcron filed this application for an extension of time to file the notice of appeal and the grounds of appeal concerning that judgment.

Background

[37] Alcron leased property located at 71 Marcus Garvey Drive, Kingston, from Port Authority for a period of 49 years with an option to renew for a further 49 years, on the terms and conditions of a lease dated 31 December 1980. The lease included details as to the manner in which any dispute or difference arising between the parties concerning it should be resolved, but did not clearly state the method by which the lease could be terminated or the manner in which Port Authority could re-enter the property.

[38] In a notice dated 13 February 2004, Port Authority notified Alcron of what it regarded as breaches of the lease agreement and allowed Alcron 60 days from the service of the notice, to remedy the breaches. Some 5 months later, Port Authority, maintaining that the breaches had not been remedied, sued Alcron in the Resident Magistrate's Court seeking to forfeit the lease and to recover possession of the property. Alcron's response was to apply on 2 February 2005 to have the suit dismissed or adjourned sine die based on its argument that the lease provided that all disputes or differences between the parties were to be settled by arbitration.

[39] The Resident Magistrate adjourned the matter and the parties agreed to proceed to arbitration. They selected Mr Justice Wright as the arbitrator. The parties agreed in writing to refer to arbitration the issue "whether the authority is entitled to possession of the leased premises as described in the lease." While arbitration was pending, the parties negotiated about Alcron purchasing the property. There was no agreement and regrettably, before the arbitration could proceed, the selected arbitrator died.

[40] In October 2006 Alcron informed Port Authority by letter, that it had no objection to Mr Justice Langrin being the "replacement" arbitrator and repeated its interest in acquiring the property. It asked Port Authority to inform it as to the sale price Port Authority was prepared to accept.

[41] In a letter dated 7 November 2006 Port Authority confirmed its agreement for the arbitrator to be Mr Justice Langrin and stated that the agreement to refer to arbitration was to be treated as amended by deleting the name of Mr Justice Wright and substituting the name of Mr Justice Langrin. On 23 November 2006 Mr Justice Langrin accepted the appointment and outlined the terms under which he would work.

[42] On January 2007 Alcron again wrote to the Port Authority with its proposal to purchase the land. The response came in February 2007 when attorneys-at-law for the Port Authority stated inter alia, that the parties had no agreement for sale. Port Authority also indicated that if the premises were sold, arbitration proceedings would come to an end, but if there were no agreement for sale in a timely manner, the arbitration would be proceeded with vigorously.

[43] For approximately four more months the parties exchanged letters trying to agree on the purchase price but no agreement was forthcoming. By letter dated 14 January 2008, Port Authority informed Alcron that it formed the view that Alcron was not serious about the settlement and that it (Port Authority) wished to recommence the arbitration proceedings.

[44] In March 2008 attorneys-at-law for Port Authority asked the arbitrator to set the time for them to appear and indicated that Alcron's attorneys-at-law were awaiting instructions from Alcron. Subsequently Alcron's attorneys-at-law indicated that Alcron would not participate in the arbitration unless it was to determine the sale price of the property. In a letter of 27 May 2008 attorneys-at-law for Port Authority wrote to Alcron's attorneys-at-law to indicate that there had been no settlement and therefore they would urge the arbitrator to proceed, if necessary in default. Alcron declined to participate in the arbitration process.

[45] On 30 October 2008 Alcron filed a claim seeking, inter alia, declarations that there was a binding agreement with the Port Authority for the property to be sold to Alcron and also that the manner in which the sale price was to be ascertained was stated in the lease agreement. The claim was also to prevent Port Authority from proceeding to arbitration concerning the lease until the hearing of that claim. The arbitration commenced the next day, on 31 October 2008.

[46] On 1 December 2008 the arbitrator made an award ordering Alcron to deliver up possession of the property to Port Authority. The claim before the court had not yet been heard. Some two years later, on 25 November 2010, Alcron filed an amendment to the fixed date claim form seeking additional declarations including one that the arbitration proceedings over which Mr Justice Langrin had presided and any award made there were null and void. Alcron also applied to further amend the fixed date claim form to obtain declarations that there was a joint venture agreement between the

parties, but this application was refused so as not to delay the trial of the matter, which was scheduled to commence on 12 January 2011. Port Authority responded that there was no agreement to sell the property to Alcron and counter-claimed for permission to enforce the arbitration award of 1 December 2008 of Mr Justice Langrin by the issue of an order for possession or other forms of execution as may be appropriate.

[47] On 11 January 2011, the day before the trial was scheduled to start and did in fact start, Alcron filed another claim against Port Authority, contending that the parties had had a joint venture agreement from December 1980 concerning the property and that Port Authority was to pay or credit Alcron the sum of US$5,056,179.78 which Alcron had invested in improving the property.

[48] The trial commenced on 12 January 2011. About a year later, on 27 January 2012, the learned trial judge delivered judgment finding that there was no binding agreement between the parties for the sale of the property. She also declared that the arbitrator Mr Justice Langrin had been properly appointed to decide on issues which formed the basis of the original agreement. The learned judge declared that the arbitration proceedings and the award were valid, and consequently gave Port Authority permission to enforce the arbitration award.

[49] Alcron waited almost one year to seek leave to extend the prescribed time to file notice and grounds of appeal against the judgment and does so by this application. The proposed notice and grounds of appeal were exhibited.

[50] In April 2012 the Port Authority applied to strike out the claim filed 11 January 2011. That claim was struck out in June 2013, as an abuse of the process of the court on the ground that the matter had already been decided between the parties in this instant matter at first instance.

[51] Counsel for Alcron submitted that the learned trial judge had erred in ruling that the arbitration and the award were valid when the proceedings had been unjustifiably and wrongly conducted and also in finding that there was no agreement for sale between them. Alcron, it was submitted, has a good prospect of success on appeal.

Delay

[52] Mr Roy Williams, a director of Alcron, in his filed affidavit sought to explain the reason for the delay in making the application. He stated that Alcron had always intended to challenge the judgment but did not have the resources to instruct its attorneys-at-law, primarily because of the illness of the late Mr Elworth Williams. Mr Elworth Williams had been the "Chief Principal" of Alcron and had suffered a stroke in 2010 from which he did not recover and had died in November 2012. The illness of Mr Williams had drained the resources of Alcron, as it had to cover the medical expenses and other expenses of its "Chief Principal" while he was ill, leaving none to be used to prepare and prosecute the appeal.

[53] Further, Alcron's ability to earn income or to access financing or funds was seriously impaired because Mr Elworth Williams was generally identified as the "face" of Alcron, and he was ill. According to Mr Roy Williams, Alcron had tried unsuccessfully to

access funds. Its affairs suffered. By the time the judgment was delivered, Alcron owed a significant sum to its attorneys-at-law who then refused to continue representation unless the fees were settled. Consequently, the appeal had not been filed. It was not until the week of 11 March 2013, that Mr Roy Williams had come to an agreement with the attorneys-at-law to continue the representation.

[54] Counsel for Alcron argued therefore that the delay was due to the absence of funds and urged the court to accept that as being a good basis for Alcron to have failed to appeal in the correct time and counsel asked that the court grant the extension of time in the interests of justice. On the other hand, counsel for Port Authority submitted that Alcron is a limited liability company which had other officers, besides Mr Elworth Williams, who could give instructions to the attorneys-at-law in his absence due to ill health. Mr. Roy Williams had signed the fixed date claim form of 2011 and in June 2011 had signed the particulars of claim on behalf of Alcron. This situation, counsel argued, shows that the illness of Mr Elworth Williams could not have prevented Alcron from instructing its attorneys-at-law. Further, since November 2010, Alcron had given instructions in relation to the 2008 claim.

[55] Counsel for Port Authority relied on **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6 to support his argument that the lack of resources was not a good reason for the delay in filing its appeal [para 20]. He distinguished **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999, delivered 6 December 1999) as not being applicable here

as it was decided on its own particular facts and he urged the court to refuse the extension of time to file the notice of appeal and thereby allow Port Authority to enjoy the fruits of its judgment.

Prospect of success — agreement for sale

[56] Counsel for Alcron argued that Alcron had a good chance of success on appeal. According to her, the learned trial judge had considered whether or not there was a binding agreement for sale of the land when that was not the issue. She submitted that the parties had already agreed on the sale but had expressed differences as to the manner by which the sale price would be determined. Alcron had wished to use the mechanism prescribed in the lease agreement, whereas Port Authority wished to rely on the valuation report it had secured. The learned trial judge had thus failed to understand that the true issue was determining the sale price of the property. The focus of the parties was no longer on arbitration but rather, had shifted to the issue of the sale price of the property. Consequently there was a real prospect of Alcron succeeding on appeal.

[57] On the other hand, counsel for Port Authority argued that the learned trial judge was correct in finding that there was no legally binding agreement between the parties as to the sale of the property in the absence of consensus on the sale price or the method of determining it, these being essential components of the agreement.

Prospect of success - arbitration

[58] Counsel for Alcron submitted that the learned judge had also failed to recognise the several flaws in the arbitration process which affected the validity of the arbitration and which provided Alcron with a good prospect of success on appeal:

(a) Alcron had not agreed to the terms of engagement of the arbitrator.

(b) The arbitrator had not confirmed with Alcron the terms of his engagement as he had agreed them with Port Authority nor did he indicate if or when Port Authority had met those terms.

(c) The arbitrator conducted the arbitration in the absence of Alcron.

(d) Alcron did not receive a copy of Port Authority's submissions.

(e) Alcron did not get the opportunity to respond to the submissions.

(f) Alcron did not receive a copy of the arbitration decision.

These can be conveniently categorised as challenges to (1) the proper appointment of the arbitrator, Mr Justice Langrin and (2) the actual fairness and the apparent fairness of the arbitration process.

[59] In support of her argument that Alcron has a good prospect of success on appeal, counsel argued further that the learned trial judge had not appreciated that in any event, the arbitration should not have proceeded because Alcron had filed a claim in court seeking to prevent the arbitration from taking place until that claim before the court had been heard.

[60] Counsel for Alcron also argued that in any event the learned trial judge had fallen into grave error in failing to appreciate that Alcron no longer needed an arbitrator to determine the original terms of reference of the arbitration because the parties had come to a new agreement. Port Authority's decision to sell the property to Alcron superseded the original issue which had caused the parties to proceed to arbitration before Justice Wright, that is, recovery of possession of the property by Port Authority. The focus of the parties was no longer on arbitration but rather, had shifted to the issue of the sale price of the property.

[61] On the other hand, counsel for Port Authority maintained that the learned judge had properly considered all the issues of the arbitration and the evidence supported her findings.

Prejudice

[62] Counsel for Alcron submitted that Port Authority would suffer no, or no undue prejudice if an extension were granted, because Port Authority has had possession of the property for "a significant period of time even prior to the determination of the trial in the instant matter". On the other hand, submitted counsel, Alcron will suffer prejudice if the extension is refused as it will lose the opportunity to challenge the judgment and the possibility of recovering the investment, which it describes as being massive, and which it had made as a result of the original agreement between the parties. Counsel for Port Authority argued that it would be prejudiced by the granting of an extension as it has already taken steps in relation to the property and has

incurred costs as a consequence of the judgment.

Analysis and Discussion Procedure

[63] The Court of Appeal Rules define the time within which a notice of appeal must be filed (rule 1.11(1)), but allow for an application to be made for extension of that prescribed time to file the appeal (rule 1.11(2)). Rule 1.7(2)(b) permits that extension, even if the application for the extension is made after the time for compliance has passed. The rules do not state the factors to be considered in granting such an application but assistance is to be found at common law.

[64] In **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** this court held that the factors to be considered in granting an extension of time include the length of the delay and the reason for it, whether there is merit in the appeal and whether the other party would be prejudiced by the grant of an extension of time.

[65] More recently in **David Wong Ken v National Investment Bank of Jamaica Limited et al** [2013] JMCA App 14 this court reviewed the principles to be considered in applications for the extension of time. There Brooks JA referred to **Jamaica Public Service Company Ltd. v Rosemarie Samuels** [2010] JMCA App 23 (paras [8]-[9]) where Morrison JA adopted the principles applied by Panton JA (as he then was) in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes**:

> "The legal position may therefore be summarized thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(i) the length of the delay;
(ii) the reasons for the delay;
(iii) whether there is an arguable case for an appeal and;
(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

Length of delay

[66] The issue of the length of delay came to be determined in **David Wong Ken v National Investment Bank of Jamaica Limited et al**. In that case, there had been a delay of seven months between the service of the formal order of the judgment and the filing of the appeal. The court stated that the delay alone would not have been decisive to refuse the application for the extension of time to file the appeal but refused it because it was of the view that there was no likelihood of success on appeal.

[67] In my view, the delay here, of almost a year is, in and of itself, inordinate. The judgment had been served on 20 February 2012. The notice of appeal should have been filed within 42 days of that service (rule 1.11(1)(c)) that is, by 3 April 2012. The application for an extension of time to appeal the judgment was filed on 18 March 2013, almost a year later than when the notice of appeal ought to have been filed. Port Authority could quite reasonably have proceeded to order its affairs in keeping with the

judgment when such a long period of inactivity by Alcron had elapsed after the delivery of the judgment. The next consideration is the reason for the delay. Was the reason excusable in the circumstances?

Reason for the delay

[68] The reason proffered by Alcron for the delay is the lack of funds. This court has regarded impecuniosity as a good reason for delay and in **Leymon Strachan v Gleaner Company Ltd v Dudley Stokes** Harrison JA said:

> "The Applicant's plea of impecuniosity as the reason for his delay is a plausible one, in my view, and the circumstances sufficiently explain the delay of five months to enable the court to exercise the discretion in his favour." (page 8)

[69] Impecuniosity is, to my mind, a compelling reason for one's inability to access legal services which do sometimes come at a relatively high price. However, the court is mindful of the fact that the absence of funds may be unjustifiably proffered as a reason for delay in undeserving instances. Panton JA noted in **Leymon Strachan v Gleaner Company Ltd v Dudley Stokes**:

> "Indeed, it may appear to be too easy an escape route that would no doubt be exploited by delinquent litigants who have no regard for the processes and procedures of the Court." (page 21)

In this case, it is uncontroverted that while the late Mr Elworth Williams lay ill from 2010, business at Alcron became less vibrant and less prosperous in his absence. An important question must, however, be whether Alcron, the applicant, can properly rely

on the illness of Mr Williams, as a good reason for not continuing its litigation with promptness, when it is a separate entity from Mr Elworth Williams.

[70] Alcron is a limited liability company with its own officers. Indeed Alcron has continued despite Mr Elworth Williams' death, and Mr Roy Williams in affidavits speaks on behalf of Alcron. It is however, unchallenged that Mr Elworth Williams was the "face" of Alcron, its "chief principal", and without him funds and loans were not readily accessible. Alcron's funds were used to maintain him. As his health declined, so too did business at Alcron. I conclude from the evidence that the fortunes of Alcron and of Mr Elworth Williams, during the period of his illness, were inextricably intertwined.

[71] The judgment being appealed was delivered in January 2012. Mr Williams died in November 2012. This judgment appeared to be fundamental to the "health" of Alcron, touching as it did, on its occupation of property in which the unchallenged evidence is that it had made massive investments. It is true that Alcron gave instructions to its attorneys-at-law even while Mr Williams was unwell. Indeed, the other suit which was filed was in 2011 while Mr Williams was ill. That suit sought a declaration that there was a joint venture arrangement between Alcron and Port Authority. Alcron was maintaining that theirs was not simply a landlord and tenant relationship, but that Alcron, with the knowledge and consent of Port Authority, had invested vast amounts in the property with the expectation of returns. Alcron's earlier effort in November 2010 to amend the fixed date claim form to include a claim for such a declaration had been refused in order to prevent delay to the commencement

of the trial. Clearly Alcron regarded the consideration of that allegation as critical and urgent. The legal expenses would have been increasing, meanwhile Mr Williams inched closer to death. The illness was obviously very serious, culminating as it did, in his demise. His and Alcron's inability to access funding for additional legal pursuits was real. In my view, the absence of funding for legal fees in these particular circumstances of grave illness is an excusable reason for the delay in filing the notice and grounds of appeal.

[72] It is of interest that tardiness seems to have affected both parties. In her judgment the learned judge indicated that Port Authority filed its defence and counter-claim on 19 May 2010, approximately one year and seven months after Alcron had filed its fixed date claim form.

Arguable case

[73] The next principle to be considered is whether there is an arguable case for an appeal of the judgment. In her judgment the learned trial judge made the following decisions:

> "1. There was no binding agreement between the claimant and the defendant to the effect that the claimant will purchase from the defendant and the defendant will sell to the claimant the relevant property.
>
> 2. Hence [sic] there can be no declaration as to the manner or method by which any sale price is to be ascertained or calculated.
>
> 3. The arbitrator Mr. Justice Langrin was properly appointed.

4. The agreement between the parties to appoint Mr. Justice Langrin as the arbitrator was to decide on issues which formed the basis of the original agreement in which Mr. Justice Wright was appointed arbitrator.

5. The arbitration proceedings over which Mr. Justice Langrin presided and the award made thereto are valid and cannot be declared null and void."

[74] This decision which Alcron seeks to challenge on appeal can be conveniently categorised as determining two issues:

1. The non-existence of any agreement between the parties concerning the sale of the land and the sale price.

2. The validity of the arbitration itself including the correctness of the appointment of the arbitrator and the agreement as to the issues to be decided.

I now consider the prospects of success of the appeal as it concerns each of these categories.

Arguable case - agreement for sale

[75] The learned trial judge concluded that there was no agreement for sale because of the absence of an agreement on the purchase price. However, the evidence was that the lease provided the method by which a purchase price should be reached. The lease provided, inter alia, that:

> "5[3] ...the Landlord shall sell the leased premises to the Tenant with the purchase price being the unimproved value of the leased premises at the time of the exercise of the option as determined either by the Commissioner of Lands or by the Commissioner of Land Valuations."

Therefore the question of whether or not there was an agreement for sale would include consideration of whether or not the lease agreement still existed and if the conditions for the sale had arisen. The learned judge stated that the lease was "seemingly silent as to the provisions for the termination of the lease..." (para [10]).

[76] Port Authority clearly regarded it as having been terminated. From February 2004, Port Authority had alleged that Alcron breached the terms of the lease which was the basis for commencing the recovery of possession suit in the Resident Magistrate's Court, and Alcron alleged that in so doing, Port Authority itself had breached the agreement. The relationship between the parties was clearly not harmonious but there is no evidence that they agreed that either party had breached the lease, nor was there a declaration that it had been terminated. The lease had commenced in 1980 and was for a period of 49 years, renewable for a further 49 years.

[77] In any event, there was extensive correspondence between the parties concerning their views as to how the property should be valued in order for a purchase price to be determined but there was no agreement in that regard. In her judgment the learned judge observed that "[i]t is from the series of correspondence that one needs to determine if any binding agreement existed" (para [19]). The learned judge concluded at para [38]:

> "....it is of course significant that the claimants are not asserting the existence of a contract. It is a binding agreement they say was [sic] between the parties. A binding agreement must therefore be viewed as a lower form of agreement than a contract....if price is left to be agreed in a contract for sale there is no contract"

[78] The learned judge referred to the correspondence between the parties which had been seeking to reach a method to ascertain a sale price. She did not, however, indicate if she had considered whether the exchange of the letters showed that quite apart from the lease, the parties intended to enter into a contract, or if any of the letters should be regarded as containing an offer and acceptance to enter into a sale agreement, in the event that the lease had been terminated.

[79] Counsel for Alcron had further argued that the learned trial judge had erroneously considered whether or not there was a binding agreement for sale of the land when that was not the issue because the focus of the parties was no longer on arbitration but rather, had shifted to the issue of the sale price of the property.

[80] In my view the judge was correct in considering if there were an agreement for sale, but in any event the issue of the sale price may have been inextricably bound up with the terms of the lease and whether the lease existed. In my view the question as to whether there is an agreement for sale must be considered with reference to the terms of the lease. It follows that a determination as to whether the lease still exists would have to be made. The omission of such a determination provides an arguable ground of appeal.

Arguable case — validity of arbitration

[81] The learned judge reasoned that there had been no objection to Mr Justice Langrin being the replacement arbitrator and interpreted that to mean that he would carry out the functions of the original arbitrator, Mr Justice Wright. She stated that there was no challenge expressed to the terms indicated by Mr Justice Langrin (para [76]) when he was asked to recommence proceedings. The learned judge however, did not advert to the fact that there was no evidence that the two arbitrators had contracted for the same terms of employment. The learned judge appreciated that there was no specific agreement with Mr Justice Langrin about the amount payable for fees and how they should be paid. She regarded it as "practicable for the arbitrator to fix his fee in advance and hence it would be appropriate for Mr. Justice Langrin having accepted the appointment to fix his fees." (par [77]). She accepted the approach contained in Russell on Arbitration:

> "Where there is no express agreement about fees and expenses, the right to remuneration has been understood to depend on an undertaking to be implied from the appointment of an arbitrator, to pay reasonable remuneration for his services." (at para 4-090)

[82] The learned judge did not agree with the submission that the arbitrator's acceptance was conditional upon the fees being agreed (para [77]) and said that there was "no challenge expressed to the terms he had indicated a [sic] the time he was asked to recommence the proceedings" (para [76]). However, the evidence was that Alcron did not agree to the recommencement of the arbitration and thus it may be

arguable that it could not have agreed to the terms of Mr Justice Langrin at that time. The question of whether the learned trial judge gave full consideration to the validity of the appointment of the arbitrator may well be an arguable case for appeal.

[83] The learned judge did not treat with the unchallenged evidence that Alcron was not served with the decision of the arbitrator or if that fact affected the enforcement of the award in any way. Nor did she refer to the effect on the arbitration of the failure of the arbitrator to provide Alcron with the submissions of Port Authority and the opportunity to respond in circumstances where Alcron elected not to participate. Indeed the evidence was that the parties did not agree as to the terms of reference of the arbitration. In determining if the arbitration proceedings were valid therefore, consideration ought to be given to these issues. In the absence of such consideration an issue arises which is arguable on appeal as to whether there was a proper determination of the validity of the arbitration proceedings.

Overlap of claim with arbitration

[84] The learned judge's view was that the issues she had to determine did not overlap with the issues the arbitrator had been asked to resolve (para [80]). The evidence is that Alcron had argued that the only issue for arbitration was the method by which the sale price should be determined or alternatively the mechanism to be used to determine the purchase/sale price. The learned judge accepted that the only issue for arbitration was "whether the Authority is entitled to possession of the leased premises as described in the lease" (para [67]). However, the claim that was before

the learned judge sought declarations concerning the agreement for sale between the parties, the method by which the sale price should be ascertained, the appointment of the arbitrator, the validity and enforcement of the arbitration, and an order preventing Port Authority from proceeding to arbitration regarding these matters or the property until the hearing of the case. The declarations subsequently sought additionally were that the arbitration proceedings were null and void and that the arbitrator had not been properly appointed.

[85] The learned judge concluded that the claim before the court did not oust the jurisdiction of the arbitrator. Her view was that the matter before the court did not overlap with the matter before the arbitrator because the suit did not involve Alcron's right to possession of the property. However, the declarations in the claim concerned the sale of the property which must impinge directly on its possession. It is true that the learned judge did not consider whether there was repudiation of the agreement to arbitrate when Alcron filed the claim in court for an order preventing Port Authority from proceeding to arbitration in respect of matters regarding the lease agreement. However, that issue does not appear to have been raised in the court below and therefore would not be a consideration for this appeal.

[86] In my view, there is nonetheless a good prospect of arguing successfully on appeal that the learned judge fell into error in finding that the arbitration proceedings were valid.

Prejudice

[87] It is undisputed that Alcron's investment was a multi-million dollar one involving extensive work on the property. If this application is not granted Alcron loses the opportunity to argue the appeal on the issues of the existence of any agreement for sale of the property, the validity of the arbitration and consequently its right to possession of the land. Its investment is at stake.

[88] On the other hand, Port Authority has recovered possession of the property, has engaged security for it and is said to be in the process of clearing the land. Further, Port Authority expects to be deciding whether the property will be developed or will be sold to one of two companies which have expressed interest in it. If the application to extend the time to appeal were granted, therefore, the prejudice to Port Authority would be a delay in exploring/accessing business opportunities and also any associated inconvenience or expense. This has not been quantified. In addition, there were plans for use of the property although specifics were not given.

[89] Counsel also submitted that the evidence suggests that Alcron would have serious difficulties in satisfying a costs order against it in the event that it is granted an extension of time to file an appeal and that appeal is unsuccessful. This would lead to further prejudice to Port Authority.

[90] It is of note that in her judgment the learned judge indicated that Port Authority filed its defence and counter-claim on 19 May 2010, approximately one year and seven months after Alcron had filed its fixed date claim form.

[91] In my view, if time is extended to file the notice and grounds of appeal, the degree of prejudice to Port Authority is less than the prejudice to Alcron if it is not permitted.

Conclusion

[92] In my view, the delay in applying for leave to appeal is inordinate but the reason given for it is excusable. The prejudice which Alcron stands to suffer if the extension is not granted is greater than the prejudice which the Port Authority would suffer if it were granted. Further, in my view, there is an arguable case for an appeal on the issues which Alcron has raised. The courts have repeatedly remarked that the important consideration in determining if an extension of time to file a notice of appeal is granted is to ensure that justice is done between the parties. In my view, the circumstances in this matter are such that as to cause the court to exercise its discretion, the overriding principle being that justice has to be done.

[93] Accordingly, I would have granted Alcron's application for an extension of time to file the notice and grounds of Appeal.