JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 13/2010

BEFORE: **THE HON. MR JUSTICE HARRISON J.A.**
THE HON. MISS JUSTICE PHILLIPS J.A.
THE HON. MRS JUSTICE McINTOSH J.A. (Ag)

BETWEEN	**ARAWAK WOODWORKING ESTABLISHMENT LTD**	**APPLICANT**
AND	**JAMAICA DEVELOPMENT BANK LTD**	**RESPONDENT**

Winston Taylor for the Applicant

Jermaine Spence and Courtney Bailey instructed by DunnCox for the Respondent

24 February and 14 May 2010

HARRISON J.A

Introduction

[1] On 20 July 2009, Master Simmons (Ag.) dismissed a claim brought by Arawak Woodworking Establishment Limited (the applicant) against Jamaica Development Bank Limited (the respondent) for want of prosecution. The learned Master ordered as follows:

> "(i) Claim dismissed for want of prosecution
>
> (ii) Costs to the defendant to be taxed, if not agreed.

(iii) Leave to appeal granted to the Claimant."

On 24 February 2010, we refused an application seeking extension of time within which to file the notice of appeal with costs to the respondent to be taxed if not agreed. We promised then to put our reasons in writing. So, this is a fulfillment of that promise.

The background

[2] The facts reveal that the applicant is a registered company under the laws of Jamaica. The respondent is a statutory body and an approved lending institution, registered under the laws of Jamaica.

[3] In or about the month of March 1974 the applicant issued to First National City Bank (FNCB), a debenture charging its undertaking, property assets, capital and goodwill as security for the sum of $120,000.00. Due to the applicant's inability to service its loan responsibly, FNCB placed the applicant in receivership under powers contained in the aforesaid debenture in or about August 1976. The applicant alleged that by letter dated 20 October 1976, the respondent had offered to take the applicant out of receivership on certain terms and conditions which were accepted by the applicant. The respondent then proceeded to put a new board in place and to appoint new officers of the applicant. Sums of monies were injected in the applicant by the respondent but it was contended by the applicant that at all material times, the respondent improperly exercised undue influence over the applicant and its affairs and thereby caused the affairs of the

applicant to be improperly administered. As a result, the applicant filed a Writ of Summons in the Supreme Court on 1 September, 1981 and sought to recover damages from the respondent for negligence.

[4] Some twenty-eight (28) years seemed to have elapsed since the filing of the suit. There were periods when the parties were in discussion trying to arrive at a settlement. Finally, the respondent made an application to have the action dismissed for want of prosecution. On 20 July, 2009 the learned Master made the order referred to in paragraph 1 (supra).

Failure to file the notice of appeal on time

[5] The applicant having been granted leave to appeal failed to file the required notice of appeal within the prescribed fourteen days as required by rule 1.11 of the Court of Appeal Rules 2002 (the COAR). This notice was not filed until 11 November, 2009. So, a period of fifty-four (54) days at the very least (excluding the period during the legal vacation) had elapsed since the granting of leave to appeal by the Master.

[6] The records also revealed that the applicant had been advised by the Registrar of the Court of Appeal that it needed to apply to extend or enlarge the time for filing the notice of appeal. Despite this reminder, it was not until 21 January 2010 that the applicant filed a notice of application for court orders seeking an extension of time within which to file the notice of appeal. The notice of application and proposed notice of appeal were filed personally by the

applicant. The firm of Rattray Patterson Rattray which formerly appeared on behalf of the applicant in the proceedings below had formally removed its name from the record.

[7] The notice of application sought the following orders:

> "(i) The time for the filing of the Notice of Appeal in this matter be extended to the 11th November 2009;
>
> (ii) The Notice of Appeal filed on the 11th November 2009 be deemed to stand in good stead;
>
> (iii) No order as to Costs;...
>
> (iv) ....."

[8] The grounds on which the applicant sought the above orders are as follows:

> "(a) That the failure to comply by the Applicant has not been intentional;
>
> (b) The Applicant is no longer represented by Counsel
>
> (c) That the Claimant will be unduly prejudiced if the extension is not granted; and
>
> (d) The Claimant believes she has a strong case for Appeal."

[9] The notice of application was supported by an affidavit sworn to by Mrs. Violet Taylor, managing director of the applicant. The affidavit evidence sets out, inter alia, background facts including termination of the applicant's attorney's

retainership which she said was to a large extent responsible for the delay in filing the notice of appeal, and the proposed grounds of appeal if she were to be successful in the notice of application.

[10] Mrs. Taylor then deponed at paragraphs 6 – 9 as follows:

> "6. The Court is being asked to grant the Claimant an extension of time as the Claimant meant no disrespect to the Court and the delay was wholly unintentional.
>
> 7. The Court is further being asked to grant the extension when it considers the prejudice to the Claimant herein. At the time this claim was commenced the Claimant was insolvent and due to a number of reasons, one being the Claimant's inability to finance protracted litigation, the Claimant was constrained to change its Attorneys at Law on a number of occasions. The Claimant's impecuniosity which in some instances was exacerbated by the Defendant has served to hinder the litigation of this matter.
>
> 8. I believe the Claimant has good prospects of succeeding in the appeal when one has regard to the facts including the fact that the parties were in negotiations for a protracted period, there were changes in the procedures in the Supreme Court and the unequal bargaining powers of the parties.
>
> 9. That in light of the foregoing, I pray that this Honourable Court do grant the orders as prayed in the Notice of Application for Court orders."

The Submissions

[11] Mr. Winston Taylor, attorney-at-law, appeared for and on behalf of the applicant. He informed the court that he was relying on the affidavit filed by Mrs. Taylor on 21 January 2010. His submissions were indeed brief and after some urging by the court, he submitted that the respondent would not be prejudiced if the application were to be granted since most of the evidence for the trial would be documentary evidence. The lapse of time, he said, should not be prejudicial to the respondent. He also argued that there had been on-going negotiations between the parties for some period of time and in these circumstances, the orders sought should be granted.

[12] Mr. Jermaine Spence for the respondent, in addition to written submissions that were filed, made oral submissions to this court. In his written submissions, he referred to a number of authorities pertaining to the role played by the court in exercising its discretion in granting an extension of time in order to comply with rules of court. First and foremost, reference was made to **Finnegan v Parkside Health Authority** [1998] 1 WLR 411. He also referred to **Mortgage Corporation Ltd. v. Sandoes** The Times, 27 December 1996; **Eastwood Care Homes Ltd v Customs and Excise Commissioners** [1999] V&DR 369; **Arbuthnot Latham Bank Ltd. v Trafalgar Holdings Ltd** [1998] 2 All ER 181; **Paulette Bailey and Edward Bailey v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands**, Unreported (SCCA No. 103/2004) delivered 25 May 2005 and **Birkett v James** [1977] 2 All ER 801.

[13] The main thrust of Mr. Spence's oral arguments was that there had been inordinate delay on the part of the applicant in making the application for extension of time to file the notice of appeal. In addition, he submitted that the respondent had been prejudiced as a result of the delay. He submitted that there was nothing in the affidavit filed 21 January, 2010 which spoke to or accounted for the failure on the part of the applicant to comply with the rules and for the delay which amounted to at least 54 days and at most 114 days.

[14] Mr. Spence submitted that the applicant had relied on an affidavit sworn to by Mrs. Taylor on 21 April, 2009 which could not and did not assist the applicant. He argued that there was nothing in that affidavit which had explained to the court below, the reason for the delay. Mr. Spence argued that what the applicant has sought to do is to ask this court to exercise its own discretion and that this ought not to be permitted. He submitted that the appeal is more than likely to have no reasonable chance of success and that in the circumstances the application should not be granted.

Analysis of the authorities and submissions

[15] **Finnegan v. Parkside Health Authority** (supra) has laid down certain guidelines when the court comes to consider the exercise of its discretion in extending time for the filing of a notice of appeal. This is a decision of the English Court of Appeal but the courts in Jamaica have regarded the principles laid down in that case as persuasive and have followed them in a number of

decisions, both in this court and in the court below. Mr. Spence submitted that the facts in **Finnegan's** case were not dissimilar to the present case. In **Finnegan**, the appellant's claim had been dismissed for want of prosecution. A notice of appeal was filed and served 52 days out of time. The appellant thereafter applied for leave to appeal out of time, which application was heard and dismissed by a judge of the High Court on the basis that the appellant had given no explanation for the delay in filing the notice of appeal within the time limit. On appeal, the Court of Appeal reversed the decision and remitted it to the court below to be reconsidered on the basis that the court ought to take account of all the circumstances including the prejudice to the other party. The Court of Appeal held inter alia, that the absence of an explanation for the delay by itself did not dispose of the issue.

[16] In a previous decision, the English Court of Appeal approved guidelines that were issued in **Mortgage Corporation Ltd**. (supra). Among these guidelines was a consideration that when the court comes to decide whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including considerations that:

1. Time requirements laid down by the rules and directions given by the Court were not mere targets to be attempted; they were rules to be observed.

2. At the same time the overriding principle was that justice must be done.

3. Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time-limits could cause prejudice to one or more of the parties to the litigation.

4. In addition the vacation or adjournment of the date of the trial prejudiced other litigants and disrupted the administration of justice.

[17] The court in **Finnegan** had also commented on the plaintiff's likelihood of success in the trial and had this to say:

> "...where, as here, there is a very considerable delay, with no explanation of the critical period, the court will apply the guidelines laid down in **Mortgage Corporation Ltd. v. Sandoes** including guideline 1 stressing that the rules are to be observed. Consequently Mrs. Finnegan is by no means out of the wood, and even on an overall view, taking into account all relevant considerations including prejudice (if any), it by no means follows that she will succeed in gaining her extension."

[18] In **Eastwood Care Homes Ltd.** (supra), there was delay for three (3) days in making an application for extension of time within which to file and serve a notice of appeal. This delay was due to an oversight caused by the pressure of

work. The extension was granted and the court re-iterated that regard should be had to the under-mentioned factors:

i. length of delay;

ii. the explanation for the delay;

iii. the prejudice of the delay to the other party;

iv. the merits of the appeal;

v. the effects of the delay on public administration;

vi. the importance of compliance with time limits bearing in mind that they are there to be observed; and,

vii. the resources of the parties which might be relevant to the prejudice issue.

[19] It is abundantly clear from a reading of the **Finnegan Mortgage Corporation Ltd** and **Eastwood Care Homes Ltd.** cases that the court will take account of all the factors, including prejudice or continued prejudice to the respondent, in an effort to determine what is required by the overall justice of the case.

[20] In our judgment, two issues needed to be resolved. First was the question of delay and second, was the likelihood of success of the appeal. 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 least 54 days after leave was granted to appeal the decision of the learned Master.

[21] Mr. Spence submitted and we agreed with him that the grounds of appeal contained in the applicant's notice of appeal do not allege any error of law on the part of the court below. What it meant to us therefore was that the appellant was asking this court to overturn findings of fact and to interfere with an exercise of discretion based on those findings of fact by the learned Master.

[22] We were further of the view that the affidavit dated 21 April, 2009 which was filed in support of the application in the court below, did not really help the applicant. Mrs. Taylor had deponed inter alia, as follows:

> "....
>
> 6. Suit was commenced by the already insolvent Claimant in 1980s and due to a number of reasons, one being the Claimant's inability to finance protracted litigation, the Claimant was constrained to change its Attorneys at Law on a number of occasions.....
>
> 7. These changes in the Claimant's representation led to some inconsistency in the presentation of the matter and to some changes in the advice the Claimant was given.
>
> 8. On the 26th day of October 1992, the matter came on for Trial before the Honourable Mr. Justice Marsh. At the time of the trial, the parties were attempting to settle the matter and accordingly by Consent the matter was adjourned sine die.....

9. The Claimant welcomed the chance at settlement as the same seemed like the most cost effective means forward. Settlement discussions took place between 1992 to 2000. During this period there was a change in the Claimant's representation as in 1996, Messrs. Crafton Miller & Co. were retained on the Claimant's behalf and on 4th day of June 1997 a formal Notice of Change of Attorneys at law was filed.

10. The settlement negotiations failed to achieve the desired outcome, the Claimant again decided to pursue the litigation of this matter and through its then Attorneys at Law filed a Notice of Intention to Proceed on the 7th day of June 2000....

11. Thereafter, I am advised by my Attorneys at Law and do verily believe that there was a change in the procedure in the Supreme Court and my then Attorneys at Law in keeping with the procedure applied for a Case Management Conference on the 7th May 2003.

12. Since that date, I have been advised by Messrs. Crafton Miller & Co. and do verily believe that the Court file could not be located and that the date could not be set without the Court having sight of the Court file.....

13. Accordingly copies of the pleadings were provided to the Court and a date of October 2008 was fixed. I was advised by my Attorneys at Law and do verily believe that contrary to what I thought, the October 2008 hearing date was a date for the hearing of an application to remove name and not the Case Management Conference.

14. That it is due to the circumstances brought about by the Defendant, that the Claimant was unable to litigate these proceedings in the

manner that it wished and led to the Claimant being constrained to focus on settlement.

15. That at all times, the Claimant did make a bona fide attempt to settle this matter with the Defendant and, though not a step in litigation, was actively trying to resolve the issues given the Claimant's meager means.

16. In the circumstances, it would be inequitable and unjust for this Defendant to shut the Claimant out of court in circumstances where it agreed to and contributed to the delay herein."

[23] In her written judgment, Master Simmons dealt with the issue of delay and the reasons given by the applicant and had this to say:

> "It is established that in these matters, the burden of proof is on the defendant to establish inordinate and inexcusable delay. In this regard I have accepted the submissions of counsel that there has been inordinate delay in proceeding with this claim.
>
> The defendant having discharged its burden of proof it is now for the claimant to seek to provide a reasonable excuse for the delay. Various reasons have been advanced by the claimant's Attorneys to both explain and justify, the length (sic) time it has taken for the case to proceed. It is apparent, on an examination of the file that the road travelled by the claimant has (sic) not been somewhat circuitous as it has changed its legal representatives three times since the filing of the suit. This fact appears to have also contributed to the delay. The issue of whether this explanation excuses the delay must be considered in light of the impact of the delay on the justice of the case.
>
> I have accepted the submissions for (sic) Counsel for the Defendant that the parties negotiated for approximately four months in 1993. In addition even if the additional four months between December 1997 and March 1998 is

> included as a period during which settlement was being contemplated that does not give a satisfactory account for eleven years of delay.
>
> It is my view that the claimant after the 11th November 1993 should have proceeded with the matter with some dispatch. Sadly, the only activity on the file between October 26 1992, when the trial was adjourned and the 7th May 2003 was the filing (sic) a Notice of Change of Attorney and two Notices of Intention to Proceed. None of these filings represent the taking of a further step in the matter. Even if one were to accept that negotiations were still ongoing between December 1997 and March 1998 the question arises as to whether the pursuit of negotiations excuses a claimant from proceeding with the matter."

[24] Finally, the learned Master found that the applicant had failed to provide a sufficient excuse for the delay and as such the delay was both inordinate and inexcusable. She had also considered prejudice to the respondent and after considering the case of **Purdy v Cambran** [1999] CPLR 843 she concluded as follows:

> "The overriding objective as stated in the CPR requires the Court to deal "justly" with cases which arise for its consideration. Among the factors which determine whether a case is being dealt with "justly" is whether it can be conducted "expeditiously and fairly". It is therefore required that key witnesses, if not all witnesses, be available to give evidence on behalf of the claimant and the defendant. In this matter, I have accepted that the defendant is unable to find its witnesses. I have also accepted that even if they are located it is likely that their memories would be impaired by the lapse of time, as nearly thirty years have passed since this matter commenced. The defendant in the circumstances, has discharged its burden of proof and has satisfied the court, that for the reasons stated above

it will be prejudiced if the matter were to proceed to trial and a fair trial would be at risk."

[25] In light of the foregoing findings by the learned Master and the lack of or absence of an explanation for the inordinate delay by the applicant in filing the notice of appeal, we concluded that there was merit in the submissions made by Mr. Spence. Accordingly, we dismissed the application seeking extension of time to file the notice of appeal. We were of the view that time requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed. In achieving the overriding objective, litigants are entitled to have their cases resolved with reasonable expedition otherwise such delay as has been shown to have taken place in the instant case will indeed cause prejudice to the other party involved in the litigation, (see **Mortgage Corporation Ltd.**(supra)).

[28] These were our reasons for making the order set out in paragraph 1.