JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 44/2006

MOTION NO 4/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**CARIBBEAN STEEL COMPANY LIMITED**	**APPLICANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**RESPONDENT**

Mrs Denise Kitson and Mrs Trudy Ann Dixon-Frith instructed by Grant Stewart Phillips and Co for the applicant

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers Fletcher & Gordon for the respondent

14, 18 and 22 May and 20 December 2012

HARRIS JA

[1] Before this court are a motion by the applicant for final leave to appeal to Her Majesty in Council and a cross motion by the respondent for the discharge or variation of an order granted by Brooks JA on 10 April 2012, extending the time within which the record of appeal should be filed for transmission to Her Majesty

in Council. There being a pending application by each party, for convenience, reference will be made to Caribbean Steel Limited as the applicant and Price Waterhouse as the respondent. On 22 May 2012 the cross motion was refused and the motion granted. Costs were awarded to the applicant. As promised, we now reduce our reasons to writing.

[2] On 21 November 2011, on an application by the applicant for conditional leave to appeal to Her Majesty in Council, the full court made the following orders:

> "1. Leave be granted to the Applicant to appeal to Her Majesty in Council on condition that within 90 days from the date hereof they enter into a Bond in good and sufficient security [sic] in the sum of $1,000.00 for the due prosecution of the appeal and payment of all costs as may become payable in the event of final leave to appeal not being granted or if the appeal being dismissed for want of prosecution or of the Judicial Committee ordering the Applicant to pay costs of the appeal; and within the said 90 days take the necessary steps to procure the preparation of the record and the dispatch thereof to England.
>
> 2. Costs of this application to await the determination of the appeal."

[3] The applicant paid the specified sum within the requisite period but failed to procure the preparation of the record for dispatch to the Privy Council within the time ordered. On 15 February 2012, the application for an extension of time was made. Brooks JA, on hearing the application, made the following orders:

"1. That time for filing the record of appeal in the Privy Council is hereby extended to 21 days from the date hereof;

2. The costs of the application are to be borne by the applicant. Such costs are to be taxed if not agreed."

[4] On 13 April 2012, the respondent filed its motion, seeking to have the order of Brooks JA discharged or varied and for the costs of the application. The motion was made on the grounds that:

"1. The learned Judge had no jurisdiction to make the Order.

2. The learned Judge erred in failing to apply the *ratio decidendi* of this Court in ***Smith v McField*** 10 JLR 555.

3. The learned Judge was guided in part by the Court of Appeal Rules, which have no application in applications for leave to appeal to her Majesty in Council."

[5] On 16 April 2012, the applicant filed its notice of motion for final leave to appeal to Her Majesty in Council.

[6] It is important to make reference to such provisions governing an appeal to Her Majesty in Council as are necessary for the hearing of the motions before this court. Section 4 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 outlines the process pursuant to the grant of conditional leave. It reads:

"4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only –

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal...

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

[7] As can be immediately observed, section 4(a) and (b) reserves a right to the court, at the initial stage of an application, to grant leave to appeal to Her Majesty in Council and to impose conditions.

[8] Section 5 outlines the powers of a single judge in the hearing and determination of an application in respect of matters intended for appeal to Her Majesty in Council. It provides as follows:

"5. A single judge of the Court shall have power and jurisdiction-

(a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal

lies as of right from a decision of the Court;

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision."

[9] Mrs Minott Phillips QC argued that, on the grant of conditional leave, except for the Privy Council, only the court which imposes the conditions is empowered to vary them and this, a single judge is not permitted to do. The general powers of a single judge under section 5(b) of the Privy Council Rules, she argued, are only applicable to appeals pending before Her Majesty in Council. An appeal comes into existence, she submitted, when all the conditions imposed by section 4 are fulfilled. At the time of the single judge's order, she contended, there was no appeal pending, it having lapsed by the applicant's failure to adhere to the conditions imposed under the conditional order. Citing ***Smith v McField*** (1968) 10 JLR 555, in support of her submissions, she argued that the ratio decidendi in that case expressly dealt with section 4 which shows that a single judge is not empowered to vary the maximum period imposed by the court and as a consequence, Brooks JA, being bound by that

case, had no jurisdiction to have granted the extension of time to file the record of appeal.

[10] It was also counsel's contention that in ***Roulstone v Panton*** (1979) 33 WIR 23, the Privy Council found ***Smith v McField*** to have been correctly decided. In addition, she sought to distinguish several cases cited by the applicant.

[11] It was her final submission that the learned judge, in entertaining the application, erred in stating that he found assistance in rule 1.7 of the Court of Appeal Rules when those rules do not apply to appeals to the Privy Council. The applicable rules are those provided for by the Order in Council, she submitted.

[12] Mrs Kitson conceded that rule 1.7 of the Court of Appeal Rules is inapplicable in empowering the judge to consider the application. However, in response to the issue as to whether an appeal was pending before Brooks JA, she argued that ***Smith v McField*** is unhelpful in making that determination, because the ratio decidendi in that case dealt specifically with section 4(a) of the Order in Council under which the court has no jurisdiction to vary the maximum period for the payment of security for costs. Referring to the case of ***Roulstone v Panton***, she argued that their Lordships made a distinction between the conditions in section 4(a) and section 4(b) of the Order in Council and held that the court has no jurisdiction to vary the maximum period stipulated in section 4(a) but that the court may, either expressly or implicitly, re-fix the time

stipulated in section 4(b) on or before the granting of final leave. In further support of her submissions she relied on the cases of ***Allahar v Katick Dass*** (1910-16) 2 Trinidad and Tobago Reports 36, ***Reid v Charles and Another*** (1987) 39 WIR 313 and ***Pacific Wire & Cable Co Ltd v Texan Management Ltd & Others*** unreported decision of the Court of Appeal, British Virgin Islands dated 6 October 2008.

[13] Counsel argued that ***Reid v Charles and Another*** dealt specifically with section 4(b) of the Order in Council and ought to be accepted as persuasive on the point that an appeal is pending upon the making of an order granting conditional leave to appeal. Consequently, she submitted, a single judge, under section 5(b) of the Order in Council, has jurisdiction to extend the time granted by the full court to file the record of appeal. Therefore, an appeal was in existence on the grant of the conditional leave to appeal by the full court and, as the interests of justice or the circumstances required, Brooks JA was seized with the jurisdiction to extend the time for the filing of the record of appeal.

[14] Counsel further argued that, in the circumstances of the present case, it would be just to extend the time since the record of appeal had been filed but the application for the extension of time had been made two weeks late. In support of this submission counsel drew an analogy between this case and the New Zealand Court of Appeal case of ***Mobil Oil New Zealand Ltd v Bagnall*** [2001] NZCA 12, delivered 7 February 2001, in which an extension of time was granted despite an application being made approximately two weeks after the

time for compliance had lapsed but at the time of the hearing, the record of appeal had already been filed with the registrar of the court. She also brought to our attention the cases of ***Specialised Livestock Imports & Others v Daren Donald Borrie & Others*** [2003] NZCA 275 delivered on 26 November 2003, and ***Carter Holt Harvey Building Products Group Ltd v Commerce Commission*** [2003] NZCA 37, delivered on 3 March 2003 to support the contention that an extension of time may be granted notwithstanding a delay in seeking to extend time.

[15] In the instant case, counsel argued, the respondent has not shown that it would suffer any prejudice by the delay and has only claimed prejudice by way of its inability to access the fruits of its judgment. The applicant, she submitted, has shown that the delay was due to the voluminous quantity of material to be compiled which took more time than anticipated, thereby causing the prescribed period for filing the record of appeal to be inadvertently overlooked.

ANALYSIS

[16] The issues arising are:

1. Whether at the time of the application for extension there was a pending appeal.

2. Whether the single judge had jurisdiction to grant the application for an extension of time.

3. Whether the respondent suffered prejudice as a result of the applicant's delay in filing the record of appeal within the prescribed time.

[17] Section 4 of the Order in Council, in providing for the grant of conditional leave to appeal to Her Majesty in Council, prefaces such provision on two separate limbs, section 4(a) and (b). Section 4(a) confers upon the court an initial right to grant leave to appeal and make an order for the entering into security for the due prosecution of the appeal. Section 4(b) provides for the taking of steps for the preparation and the dispatch of the record to England within a period fixed by the court, not exceeding 90 days. This rule also empowers the court to impose other conditions. Compliance with both limbs of the rule is necessary prior to the grant of final leave.

[18] There is no dispute that the applicant had fulfilled the first limb but failed to perform the second within the time allotted. It is also common ground that neither the court nor a single judge is empowered to extend the time for entering into security for the costs of the appeal.

[19] Section 5(b) of the Order in Council, although clothing the single judge with jurisdiction to make orders and give directions, restricts his power to grant conditional leave to appeal. Accordingly, an application can only be entertained by him in circumstances where an appeal is pending before Her Majesty in Council.

[20] Counsel for the respondent, in contending that there was no pending appeal at the time of the application before Brooks JA, was encouraged by the dictum of Luckoo JA in ***Smith v McField*** when he said at page 557:

> "The provisions of s.5 do not enlarge the powers and jurisdiction of the court but relate solely to the powers and jurisdiction of a single judge of the court. By s. 5(a) a single judge of the court is empowered to hear and determine applications for leave to appeal in certain cases and by s.5(b) a single judge is empowered 'to make such orders and to give such other directions as he shall consider the interests of justice or circumstances of the case require'– *in respect of any appeal pending before Her Majesty.* An appeal is not pending before Her Majesty until all of the conditions imposed under s. 4 are fulfilled."

[21] Brooks JA, in giving consideration to the question as to what constitutes a pending appeal, examined ***Smith v McField*** as well as the cases of ***Allahar v Katick Dass***, ***Roulstone v Panton*** *and* ***Reid v Charles and Another*** together with section 14 of the Order in Council and said:

> "The court in ***Reid v Charles and Another*** declined to follow that reasoning. I, with respect to the decision in ***Smith v McField***, am inclined to prefer the reasoning of the court in ***Reid v Charles and Another***, concerning this point. Firstly, as was pointed out in the latter case, there is a shift in nomenclature from section 3 of the Order in Council, where, before permission to appeal is granted, the party seeking leave is referred to as 'the applicant', but after conditional leave is granted, that party is referred to as 'the appellant'. Secondly, section 14 of the Order in Council refers to an appeal being in existence, 'at any time prior to the making of an order granting' final leave to appeal. The section states:

> *'An appellant who has obtained an order granting him conditional leave to appeal may, at any time prior to the making of an order granting him final leave to appeal,* ***withdraw his appeal*** *on such terms as to costs and otherwise as the Court may direct.'*
>
> I find that the section implicitly contemplates an appeal being in existence, despite the fact that the conditions for the grant of leave have not yet been fulfilled. Even if it is argued that the appeal exists only so long as the time for compliance has not expired, that argument impliedly accepts that ***Smith v McField*** is not correct in stating that no appeal is pending until the conditions are fulfilled.
>
> I also accept that it was the failure of the appellant to pay the security, with which the court had had to contend in ***Smith v McField***. I agree with Mr Braham's submission that the opinion in that case concerning paragraph (b), dealing with the other conditions is *obiter dictum*. I, therefore, find that I may follow the reasoning and decision of the court in ***Reid v Charles and Another*** and rule that, on the first question, the grant of conditional leave does give rise to an appeal."

[22] In ***Smith v McField***, on the grant of conditional leave to appeal to Her Majesty in Council, the appellant was required to pay into court, within 90 days, the sum of £500.00 as security for the due prosecution of the appeal and within four months to take the necessary steps for procuring the preparation of the record for dispatch to England. The sum ordered as security was not paid within the time specified and an application for an extension of time to comply with the order was refused, it having been held that the time for the payment of the security could not be extended, by the court or a judge, beyond the 90 days.

[23] Counsel for the respondent expressed the view that ***Roulstone v Panton*** does not alter the position in ***Smith v McField***, in that, in ***Roulstone v Panton***, there was no application before the court for an extension of time for the filing of the record and that it does not show that a single judge can extend time. This being so, counsel argued, the statement that the full court can refix the period prior to granting final leave is obiter. We are constrained to disagree with counsel.

[24] In ***Roulstone v Panton*** the appellant was granted conditional leave to appeal to the Judicial Committee under section 5(a) and (b) of the Order in Council 1965 which is substantially similar to our section 4(a) and 4(b). Under 5(b) the appellant was required to "procure the preparation of the record and dispatch to England within 120 days of the date of this order". Although the appellant furnished the record to the registrar within the requisite time, it was not dispatched to England within the time ordered. This gave rise to an application to extend the time within which to do so.

[25] The appellant's application for final leave was contested by the respondent on the ground that the appellant having failed to comply with the condition, the court had no jurisdiction to grant her application. The court granted the final leave. On appeal to the Privy Council, the Board acknowledging that there is a critical distinction between section 5(a) and (b) held that the maximum period of 90 days for giving security for the due prosecution of the appeal could not be extended by the court. However, it was further held that

the period accorded to the appellant for the procurement of the preparation and dispatch of the record was in the discretion of the court and once determined, it could be extended expressly or impliedly and accordingly, the court had jurisdiction to have granted the final leave.

[26] At page 239 Lord Russell of Killowen said:

> "In their Lordships' opinion there is a crucial distinction between the two types of condition. In the one case there is a maximum period of 90 days laid down by the Order in Council, and clearly the court has no jurisdiction to alter the Order in Council by extending that period; and it was so held by the Court of Appeal of Jamaica under parallel provisions of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962: see ***Smith v McField*** (1968) 10 Jamaica LR 555. But it is left at large for the court to determine what period is to regulate the condition under section 5 (b) of the Order in Council of 1965, and their Lordships see no justification for holding that there is no jurisdiction to re-fix the period, either expressly or implicitly, on or before granting final leave. Their Lordships accordingly reject the preliminary point taken for the respondent."

[27] It is clear that their Lordships recognized that the effect of the decision in ***Smith v McField*** was that the maximum period given by the court for providing security for the prosecution of the appeal could not be extended beyond the 90 days granted by the court. The Board did not expressly overrule ***Smith v McField*** as to whether, in the absence of compliance with section 4(b), an appeal is in place. However, its pronouncement that it is within the discretionary powers of the court to refix the time for procuring the preparation of the record

for dispatch is of great significance. On a proper interpretation of this pronouncement, their Lordships rejected the dictum in ***Smith v McField*** that an appeal does not come into existence until all the conditions imposed under section 4 are fulfilled. To assume otherwise would be preposterous. It is impossible to accept that ***Roulstone v Panton*** does not effectively authorize the court to extend time within the purview of section 4(b). Implicit in the ruling is that the time for doing any act or complying with the rules under section 4(b) may be re-adjusted. This obviously includes the procurement and preparation of the record for dispatch to Her Majesty in Council. It is without doubt that the ratio decidendi in ***Smith v McField*** is that no extension of time can be granted where there is failure to adhere to the provisions of section 4(a), that is the payment of security for the costs of the appeal within the designated time.

[28] Counsel for the respondent submitted that in ***Reid v Charles and Another***, the court decided to depart from ***Smith v McField*** and a single judge of this court is not bound by the decision in ***Reid v Charles and Another***. It was contended by counsel that the nomenclature employed in the scheme of the Order in Council is of no assistance in construing the term "appeals pending before Her Majesty in Council". This submission compels this court to differ. It is clear from ***Roulstone v Panton*** that Luckhoo JA, in ***Smith v McField*** was indubitably speaking obiter when he stated that no appeal comes into existence until all the conditions under section 4 are fulfilled.

[29] In ***Reid v Charles and Another***, Reid was granted conditional leave to appeal to Her Majesty in Council on condition that all appointments for the preparation of the record within 90 days for dispatch to England were observed. The appellant, having failed to comply with the condition imposed, sought and obtained an order from a single judge under section 5(b) of the Trinidad and Tobago (Procedure in Appeals to Privy Council) Order in Council, which mirrors our section 5(b).

[30] Charles sought a review of the single judge's order. In its review of the matter, the court considered ***Smith v McField, Roulstone v Panton*** *and* ***Allahar v Katick Dass***. In expressing its disfavour with the dictum in ***Smith v McField*** as to the efficacy of section 4(b) and approving and applying the decision in ***Roulstone v Panton***, it held that:

> "...although the Court of Appeal had fixed a period within which certain steps in relation to the record had to be taken under section 4(b) of the Order in Council... it was open to the court at a later date to extend the time allowed and that such extension could properly be made... by a single judge of the Court of Appeal under section 5 of the Order in Council as an appeal was 'pending' from the time when conditional leave to appeal was granted; ..."

At page 321 Warner JA said:

> "... We were satisfied (1) that when time is fixed by the court under section 4 (b) for the taking of steps in relation to the record, this is not immutable and that it is open to the court to extend this time at a later stage; and (2) that the powers of a single judge under section 5 of the Order include the power to grant extensions of

> the time already fixed by the court for the taking of steps in relation to the record."

He later said at page 323:

> "In our view the whole scheme of the Order in Council shows that an appeal comes into being on the grant of conditional leave and we do not agree that 'until all the conditions imposed under section 4 are fulfilled, no appeal comes into being and, therefore, until then no appeal is pending'."

[31] As can be distilled from ***Reid v Charles and Another,*** an appeal comes into existence on the grant of conditional leave and a single judge is not precluded from accommodating an application for an extension of time for the preparation and dispatch of the record to Her Majesty in Council.

[32] The reasoning and conclusions in that case are not only appealing but are also highly persuasive as they carry great force in showing that: an appeal is founded on the grant of conditional leave; and the period fixed by the court for the taking of steps in connection with the record may be subsequently extended by the court or a single judge.

[33] In ***Pacific Wire & Cable Co Limited v Texan Management Ltd and Others,*** the appellate court of the British Virgin Islands, approving the reasoning of the court in ***Reid v Charles and Another,*** held, inter alia, that an appeal to the Privy Council comes into existence on the date of the grant of conditional leave.

[34] In drawing a distinction between ***Allahar v Katick Dass*** and ***Smith v McField***, counsel for the respondent submitted that ***Allahar v Katick Dass*** does not show that a single judge can extend time for compliance with a condition made by the court. This is perfectly true. However, unlike ***Smith v McField***, it establishes that the court can extend the time for the preparation of the record for dispatch. In ***Allahar v Katick Dass***, the appellant paid the security for the prosecution of the appeal but failed to file the record within the time prescribed for its dispatch to the Privy Council. It was held that the Court of Appeal could not extend time for giving security for costs but may extend the time for the performance of other conditions. The case establishes that it is within the purview of the court to grant an extension of the time for carrying out acts relevant to the conditions, save and except in relation to the security for the costs. Notably, it specifically reinforces the view that an extension of time can be granted for the taking of steps relating to the dispatch of the record.

[35] It is abundantly clear from the foregoing authorities that an order granting conditional leave to appeal to Her Majesty in Council, gives birth to an appeal. An appellant may pray in aid the jurisdiction of the court to refix the time for the preparation of the record for dispatch to Her Majesty in Council. On the grant of conditional leave, a single judge, being clothed with the requisite jurisdiction, is empowered to hear and determine an application for an extension of time.

[36] A further matter to be addressed is whether the filing of the application outside of the time allotted for the filing of the record precluded the learned

judge from entertaining the application. Mrs Minott-Phillips argued that any application for an extension of time must be made prior to the expiry of the prescribed time. It was counsel's submission that ***Carter Holt*** and ***Specialised Livestock Imports & Others v Borrie & Others*** are of no assistance to the applicant as the decisions in those cases are decisions of the court and not a single judge's. An extension of time was granted in each case despite the applications for extension being made after the time for making the requisite applications had passed. In ***Carter*** **Holt**, she argued, the approach in ***Roulstone v Panton*** was wrongly employed to support the view that the court may refix the time where the application is filed out of time. In ***Roulstone v Panton,*** counsel contended, the stipulated time for compliance had been met and consideration was never given to the question as to when the application should have been filed.

[37] In ***Carter Holt***, conditional leave to appeal to the Privy Council was granted by virtue of rule 2(a) of the New Zealand (Appeals to the Privy Council) Order 1910. The appellant failed to comply with a condition requiring it to "take the necessary steps to prepare the record, secure the necessary certificate of the Registrar of the Court of Appeal as to the record, dispatch the record to London and lodge it in the Privy Council and secure registration of the appeal at the Privy Council by 31 May 2002". An application for final leave was made after the expiration of the time limited for fulfilling the condition. The respondent applied for an order rescinding the conditional leave and opposed the application for final

leave. There was a delay of approximately 10 months in the filing of the record. The court granted an extension of time despite the application being made after the time required for doing so had expired. The court in granting final leave, concluded that there was nothing in the rules which would have prevented it from considering the application for final leave.

[38] In our view, in ***Carter Holt***, the court correctly applied ***Roulstone v Panton*** as an authority to demonstrate that upon the conditional order being made for an appeal to Her Majesty in Council, on an application for final leave, the court had jurisdiction to refix the time for an appellant to take further steps in complying with the conditions which had not been met. The fact that, in ***Roulstone v Panton***, it was said that the court and not the single judge could refix the time and the time for complying with the conditional order was met, would not in any way detract from the ruling that, on the making of a conditional order, the time can be extended for preparing the record for dispatch, prior to the grant of final leave.

[39] ***Specialised Livestock Imports & Others v Borrie & Others*** also shows that the court may grant an extension of time even where there has been a delay in seeking the extension.

[40] ***Mobil Oil*** is also persuasive in showing that despite a delay in presenting an application for extension of time for the filing of the record, such application may be favourably considered. In that case, the appellants failed to comply with

the condition relating to preparation of the record of appeal for dispatch. Time for performing the specified task had expired. Despite the absence of a formal application, the court, in the exercise of its discretion, allowed time for compliance.

[41] The foregoing cases clearly show that, despite a delay in seeking the necessary leave, an appellant may be afforded time to comply with a condition for the preparation and dispatch of the record, even if that condition had not been satisfied prior to the time of the application for final leave.

[42] The final issue to be addressed is whether the grant of final leave would result in prejudice to the respondent in light of the delay. Prejudice is an integral criterion in addressing the question of the grant of an extension of time. The general rule is that the court will decline to grant an extension of time where there is tardiness on the part of an applicant in pursuing an application for an extension of time to do an act or comply with the rules of court. However, delay in itself will not necessarily operate as a bar. The court will positively countenance an application, where the circumstances so dictate.

[43] The New Zealand Court of Appeal, in ***Specialised Livestock Imports & Others v Borrie & Others***, in dealing with the question of prejudice arising by reason of delay, spoke to the issue in the following context:

> "We turn to the question of the extent to which the delays in completion of the record have caused prejudice to the respondents. Here the focus must be on prejudice over and above that inherent in the

> appellants' exercise of their right to bring an appeal to the Privy Council which includes deferral of satisfaction of the judgment unless and until it is confirmed. There must be some new prejudice, or some continuation of prejudice, brought about by the additional delay which it is unreasonable for the respondents to suffer. This must then be considered alongside the reasons given for the delay."

In that case, permission was granted to the appellants for final leave to appeal to Her Majesty in Council notwithstanding the appellants' failure to adhere to conditional orders made and their delay of approximately nine months in applying for the leave.

[44] In ***Mobil Oil*** it was held that no prejudice was suffered by the respondent despite a delay in making the application for extension of time and the court ordered that final leave would be granted provided that an agreed record was submitted to the registrar within 14 days of the order.

[45] In the case under review, although the applicant has a substantive right of appeal, this must be balanced against the respondent's right to enforce its judgment. There is no doubt that the respondent will suffer some prejudice, occasioned by the delay, in that, it will be prevented from reaping the fruits of its judgment. However, it appears that, in the exercise of its discretionary powers, the basic question for the court is whether it is fair and reasonable in the circumstances of the case to grant the extension of time.

[46] It cannot be denied that the applicant has failed to comply with the conditional order made under section 4(b) within the specified time. However,

the delay in making the application was merely two weeks, for which the applicant has given a plausible excuse, in that, by inadvertence, the preparation of the record was overlooked. Although it has been acknowledged that an order granting an extension of time would deprive the respondent of the opportunity of executing its judgment, the applicant appears to have a good arguable appeal in its contention that: the contractual terms of engagement between the parties give rise to a duty of care on the part of the respondent to the applicant; the respondent is in breach of such duty; and as a consequence, the applicant is entitled to damages. Save and except that the respondent will be impeded from enforcing its judgment, there is no evidence that it will suffer irreparable prejudice if the appeal proceeds for hearing. However, the respondent may suffer some degree of prejudice. Ordinarily, in such a case a respondent would be awarded costs as a compensatory measure for the prejudice sustained. Nonetheless, having unsuccessfully challenged the applicant's motion, it would be unjustifiable to invest the respondent with costs of the applicant's motion. In all the circumstances, it is fair and just that the applicant be granted final leave to appeal to Her Majesty in Council.

[47] In adopting a comment made by Panton P in ***Golding and Anor v Simpson Miller*** SCCA No 3/2008, delivered 11 April 2008, that litigants who consistently ignore the rules of court should not be facilitated by being permitted to cite authorities from various jurisdictions to overcome non-compliance with matters of procedure, counsel for the respondent submitted

that the question whether the court follows its own decision or now departs from it, is one of policy. This court, she argued, should jealously guard its jurisdiction in relation to Privy Council appeals. It is well acknowledged that the court is watchful in the exercise of its jurisdiction in all matters including appeals to Her Majesty in Council. There can also be no dispute that this court regards its jurisprudential system as sacrosanct. However, this does not mean that the court should not and would not be inclined to follow highly persuasive authorities in dealing with matters, including appeals to the Privy Council. The true effect of the decision in ***Roulstone v Panton***, which has been adopted in the line of cases to which the applicant has made reference, is remarkably obvious. A common thread which runs through all the cases cited, save and except ***Smith v McField,*** is that the time for the preparation and dispatch of the record of appeal to Her Majesty in Council may be re-fixed or re-adjusted. It is of manifest significance that the rationale, in all the cases cited by the applicant, which permits the court to extend time within the ambit of section 4(b), was born out of ***Roulstone v Panton***, a case from this jurisdiction. Notably, that case is a decision of the Privy Council, Jamaica's final appellate court.

[48] The learned judge was fully seized of jurisdiction to entertain the application. He carried out a review of the relevant law and such cases as were relevant to the proceedings. Save and except his finding that rule 1.17 supports his power to hear and determine the application, his reasoning, findings and conclusion, otherwise accord with his assessment of the issues which were

before him. It cannot be said that he was wrong in assuming the jurisdiction to hear and determine the matter and ultimately arriving at the decision to extend the time for the filing of the record.

[49] The cases of ***Donovan Crawford & Others v Financial Institutions Services (Jamaica) Ltd*** [2003] UKPC 13 and ***Electrotec Services Ltd v Issa Nicholas Grenada Ltd*** (1998) 1 WLR 202 cited by the applicant do not in any way advance any of the issues raised in answer to the cross motion, as correctly submitted by Mrs Minott Phillips. In ***Crawford***, the issue was whether the Court of Appeal erred in not granting final leave to the appellants. The court having granted him conditional leave, rescinded same due to the failure to comply with an order for costs.

[50] ***Electrotec*** is concerned with the fact that the appellant was entitled to an appeal as of right and would only have been deprived of the right to final leave in exceptional circumstances.

[51] The only matter which remains to be addressed is the application for final leave to appeal. The applicant has been granted leave to file the record out of time. The record, having been filed within the time specified by the order of Brooks JA, is ready for dispatch to Her Majesty in Council. There is nothing to justify the final leave being refused.

[52] The foregoing are the reasons for our decision.