

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 80/2006

APPLICATION NO 164/2012

BETWEEN	HOIP GREGORY	APPLICANT
AND	VINCENT ARMSTRONG	RESPONDENT

SUPREME COURT CIVIL APPEAL NO 81/2006

APPLICATION NO 165/2012

BETWEEN	HOIP GREGORY	APPLICANT
AND	O'BRIEN KENNEDY	RESPONDENT

23 August 2012

IN CHAMBERS

(Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules 2002)

BROOKS JA

[1] These are two applications by Mr Hoip Gregory for an extension of time within which to file his respective records of appeal, he having failed to comply with the time prescribed by the Court of Appeal Rules 2002 (CAR). He filed notices of appeal in these

two matters on 25 September 2006. The present applications were filed on 26 July 2012. Both matters arise from the same motor vehicle crash.

[2] This is not the first time that the applicant has failed to observe procedural rules. In fact, the appeals arise from the refusal of the learned Master to grant an extension of time to the applicant to file his defence out of time.

The background to the application

[3] The applications arise out of an incident that occurred on 1 November 1998 at Old Harbour in the parish of Saint Catherine. On that occasion the respondent, Mr O'Brien Kennedy was a passenger in a motor vehicle being, then driven by the other respondent, Mr Vincent Armstrong. The motor vehicle collided with a Mitsubishi Pajero motor car, which was then being driven by the applicant. Alcan Jamaica Company Limited (Alcan) owned the Pajero. Alcan was also named as a defendant to each of the claims in the court below.

[4] The claims were filed on 28 October 2004; just three days shy of the expiry of the statute of limitations. Alcan filed its defence, in respect of each claim, on 15 February 2005. These were filed within the stipulated time. The applicant failed to file his statements of defence within time.

[5] On 6 June 2006, he filed notices of application for permission to file his statements of defence out of time. The explanation, given in each of the Affidavits filed in support of the applications, was that the defence could not have been filed as the

applicant was awaiting a medical report in respect of injuries that he received in the collision.

[6] The applications came on for hearing before the learned Master on 19 September 2006. The learned Master refused the applications but granted leave to the applicant to appeal the rulings.

[7] The applicant, having filed the notices of appeal, promptly went to sleep. He remained somnolent despite several notices and letters sent by the Registrar of this court to his attorneys-at-law. Nothing further was filed on his behalf until the Registrar, in June 2012, issued a notice of default in respect of the appeals.

The application

[8] On 26 July 2012, the applicant filed, what purported to be, records of appeal. He also filed the present applications, which were each supported by an affidavit, sworn to by Mr Keith Bishop, the attorney-at-law having conduct of the appeals. The applications were referred to the full court on 31 July 2012, when the Registrar's report of the applicant's default was placed before the court. The court ruled that the applications should be placed before a single judge.

[9] In his explanation for the delay, Mr Bishop explained that he had relocated his offices in December 2011, and at that time, files were placed in different locations. He deposed that the file for these claims was inadvertently placed with some closed files and, as a result, there was some delay in locating it.

[10] The explanation is patently inadequate, as no reason was given for the failure to take any step between 2006 and 2011. There was also no explanation given for the applicant ignoring the various notices and advisories sent by the Registrar of this court, prior to December 2011, to the respective parties.

[11] It now falls to be determined whether the applicant should be allowed to proceed with these appeals and, if so, whether or not the appeals should be treated as procedural appeals.

The analysis

(a) The merits of the application

[12] It has been said that parties ignore the rules of procedure of the Supreme Court at their peril (per Panton P in **Golding and Another v Simpson-Miller** SCCA 3 of 2008 (delivered 11 April 2008) at paragraph [15]). A similar observation may be made about non-compliance with the rules of this court. Nonetheless, there are circumstances, which sometimes arise, that require a defaulting applicant to succeed, despite his default. In some of those circumstances, practicality demands that successful result.

[13] In the instant case, practicality favours the granting of these applications. As was mentioned above, Alcan Jamaica Company Limited had filed its defence within time. Despite the passage of the years, the claims have not yet been tried. There will, therefore, all things being equal, be a trial of the issues joined between the respective

respondents and Alcan Jamaica Company Limited. The issues in the trial will, of course, turn on who was the negligent party in the motor vehicle collision. The applicant, being the driver of Alcan's vehicle, it means that his testimony will be integral to the resolution of those issues.

[14] In the circumstances, it would seem that he should be allowed an opportunity to convince this court that the decision of the learned Master was incorrect and that he should be allowed to participate in the trial, not only as a witness, but as a party whose fate would be determined, not by his procedural failures, but by the decision on merits of the claims. I make no comment in respect of whether he would be allowed to file a counterclaim after the expiry of the limitation period, as in fact, he sought to do before the learned Master.

[15] Sykes J recognised the practicality of this position in **Saunders v Green and Others** 2005 HCV 2868 (delivered 27 February 2007). In a case in which one of several defendants had failed to file a defence within the prescribed time, Sykes J ruled that a judgment in default of defence should be set aside to enable the defaulting defendant to participate in the trial, where the issues concerning that defendant would have had to have been tried in any event.

[16] At paragraph 27 of his judgment, he stated as follows:

"...in cases where there are multiple defendants and a default judgment has been entered against one and that judgment does not relieve the court, at any subsequent trial, from exploring issues directly involving that particular defendant, the court should favourably consider any application to set

aside judgment provided this can be done without serious risk of injustice to the claimant. The risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party.”

[17] The learned judge relied on, as authority for that principle, **Hussain v Birmingham City Council and Others** [2005] EWCA Civ 1570. I respectfully agree with his enunciation of the principle.

[18] In applying that principle to the instant case, I find that the applicant should be allowed to pursue these appeals. It is, however, necessary to discuss the method by which they are to be pursued.

(b) The method by which the applicant should proceed

[19] It is to be noted that by letter dated 25 September 2006, the Registrar of this court advised the parties that these appeals fell within the definition of procedural appeals as set out in rule 1.1(8) of the CAR and should, therefore, be governed by the provisions of rule 2.4 of the CAR. Whereas I agree with the Registrar’s categorisation of the appeals, there is a school of thought that the opportunity to pursue the speedy procedure afforded by rule 2.4 is no longer available to the applicant.

[20] The fact is that no written submissions were filed with the respective notices of appeal. Rule 2.4(1) uses the term “must” in respect of the requirement for the filing and serving of the written submissions. It states:

“On a procedural appeal the appellant **must** file and serve written submissions in support of the appeal with the notice of appeal.” (Emphasis supplied)

In the absence of compliance, it is arguable that there are no procedural appeals before the court in these matters. The reasoning in the **Golding v Simpson-Miller** case, although concerned with different rules, may be considered in this context. In that case, it was held that the failure to serve an affidavit with a claim form rendered the claim invalid. Admittedly, the relevant rule stipulated that the permission to file and serve that claim was conditional upon the claimant doing so within a specific time. It was, in that case, the failure to meet the condition, which rendered the claim invalid.

[21] I find that the reasoning in the **Golding** case is distinguishable because of the conditional element of the permission to file the claim, whereas rule 2.4(1) has no such element. It is clear that failure to meet a condition causes the permission based on that condition to lapse. There is no conditional element in rule 2.4(1). The impact of the word "must" as used in the rule has to be now considered.

[22] In statutory interpretation, "must" has been held to be, according to the context, either mandatory or directory in its effect. In one context it, has been held to be "a word of absolute obligation and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory" (see **Posner v Collector for Inter-State Destitute Persons (Victoria)** (1947) 74 CLR 461 at page 490). In another context, a requirement that a certain specification "must end with a distinct statement of the invention claimed" was held to be "directory only, and non-compliance with it [did] not invalidate a patent" (see the headnote of **Vickers, Sons and Co. Ltd**

v George Siddell [1890] 15 App. Cas. 496). The context of the usage is therefore important.

[23] The word "must", as used in the CPR, has been considered in more than one case. In **Norma McNaughty v Clifton Wright and Others** SCCA No 20/2005 (delivered 25 May 2005) Smith JA, in a procedural appeal, held that, in the context of the transitional provisions of the CPR, the word "must", as used in rule 73.4(4) was mandatory in nature. Failure to apply to restore, within the time prescribed by that rule, meant that a case, which had been deemed struck out by rule 73.3(8), could not be restored.

[24] It has been a matter of complaint that, in **McNaughty**, Smith JA held that the term "must" as used in rule 73.4(1) and 73.4(2) did not incorporate a mandatory element (see "When is 'must' mandatory?" by Tania Mott (2009) WILJ 34(2) 211). Those rules required the registry of the Supreme Court to publish lists of proceedings which had been deemed struck out by rule 73.3(8). In respect of those rules, his Lordship held at page 9 that:

"paragraphs (1) and (2) of Rule 73.4 were not intended to make an application conditional on their provisions being complied with. **If this were so then Rule 73.4 would say so and contain provisions as to the consequences of the failure of the registry to comply and the procedure thereafter.**" (Emphasis supplied)

Whereas Ms Mott interpreted the decision to be holding that "must" meant "may" in one context, while being obligatory in the next, it would be more fair to the judgment

to state that Smith JA held that “must” was directory in the context of rules 73.4(1) and 73.4(2) while being mandatory in respect of rule 73.4(4).

[25] What can be gleaned from the judgment is that the context of the usage will determine the interpretation of the term. Another way of expressing the concept was set out in **Mayne Group Limited v Review Unit Q-Comp**, which was a decision of the Industrial Magistrates Court in Brisbane, delivered on 1 November 2002. The court stated at page 4:

“...a Court determining the validity of an act done in breach of a statutory provision may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better task for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach, of course, in this country in recent years, particularly in New South Wales.”

The court held that the classification of a statutory provision as mandatory or directory could be reached because a result has been reached on other grounds. “The classification is the end of the inquiry not the beginning (page 4).”

[26] In considering the issue of context, the fact that the court has the authority to extend the time within which to comply with a rule or an order, tends to lead to the interpretation that the word “must”, as used in the context of that rule or order, is directory rather than mandatory. In **Haddad v Silvera** SCCA No 31/2003 (delivered 31 July 2007), this court considered an application to extend the time within which to

file a record of appeal. The requirement for filing the record is contained in rule 2.7(3) of the CAR. It states, in part:

“Within 28 days of-
 (a)...
 (b)...
 (c) the filing of the notice of appeal where rule 2.5(4) applies,
the appellant **must** prepare and file with the registry four sets of the record for the use of the court...” (Emphasis supplied).

The application in **Haddad** was made pursuant to rule 1.7(2)(b) of the CAR. Rule 1.7(2)(b) allows the court to “extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension is made after the time for compliance has passed”. The court considered the application on its merits rather than deliberating on whether the failure to comply with the rule invalidated the appeal. It would seem, therefore, that the court considered that rule 2.7(3) was, in that context, directory rather than mandatory.

[27] In the case of rule 2.4(1) of the CAR, there is no provision that stipulates that the notice of appeal is invalid if the written submissions do not accompany them. No other sanction is stipulated for breaching its provisions. In the circumstances, I find that a procedural appeal, filed within the time stipulated by rule 1.11(1)(a), exists as a procedural appeal despite the absence of accompanying written submissions, as required by rule 2.4(1).

[28] Assuming, for these purposes, that I am correct that an appeal exists despite the applicant’s disregard of the requirement in rule 2.4, the question to be decided next, is

whether authority exists to vary the requirement concerning filing written submissions with the notice of appeal. Where an appeal does exist, it seems that authority is given to the court to vary the requirements of rule 2.4(1). That is a general power given to the court by rule 1.7(2)(b), and it has been exercised by the court from time to time since the promulgation of the CAR. The next question to be asked is whether a single judge may exercise that power.

[29] That question must be considered against the background of rule 1.1(8) of the CAR, which draws a distinction between the court, meaning the Court of Appeal, and a single judge of the court. A single judge of the court does not have all the powers of the court. The powers of a single judge are set out, in the main, in rule 2.11. The relevant portion of the rule states:

- "2.11(1) A single judge may make orders –
 - (a) – (d) ...
 - (e) **on any other procedural application.**
- (2) Any order made by a single judge may be varied or discharged by the court." (Emphasis supplied)

[30] The fact that a single judge may make an order in respect of a procedural application (and undoubtedly, an application to extend time is a procedural application), brings into focus the rules concerning such an application. The main rule is rule 2.10(1) which states:

- "Any application (other than an application for permission to appeal) to the court must be made in writing in the first instance **and be considered by a single judge.**" (Emphasis supplied)

[31] The combined effect of rules 2.10(1) and 2.11(1), would, in my view, lead to the conclusion that, on a procedural application, a single judge may, to adapt the terminology of rule 1.7(2)(b), "extend or shorten the time for compliance with any rule, practice direction or [order or direction of a single judge] even if the application for extension is made after the time for compliance has passed".

[32] That conclusion concerns a procedural application. The distinction must be drawn between a procedural application and a procedural appeal. In the latter, there is no doubt that a single judge, considering the appeal, may exercise any power of the court. Rule 2.4(7) stipulates that, in respect of a procedural appeal, "[t]he judge may exercise any power of the court whether or not any party has filed or served a counter-notice."

[33] Based on the above, I find that the appeals are procedural appeals, as defined by rule 1.1(8). I may, therefore, extend the time within which the applicant may file and serve his written submissions. In light of what I perceive to be the arguable bases for the appeals, I would extend the time to file the submissions.

[34] Even if I am wrong in finding that a single judge may extend the time within which to file the submissions required by rule 2.4(1), there is still a basis by which the application, as framed, may be granted. It is to be noted that the learned Master granted permission to appeal when she refused the applications to extend the time to file the defence. That permission would allow these appeals to be considered as interlocutory appeals falling within the ambit of rule 1.11(1)(b) of the CAR. That rule

does not require the skeleton arguments to be filed along with the notice of appeal, as in the case of procedural appeals. The stipulations for filing the skeleton arguments and the record of appeal are respectively governed by rules 2.6 and 2.7 of the CAR. Skeleton arguments are to be filed after the registry gives notice to the parties that the transcript of the proceedings in the court below are available (rule 2.6(1)). The registry's notice is required by 2.5(1)(b) of the CAR. The appellant, in such a case, is to file the record of appeal within 28 days from the receipt of the registry's notice (rule 2.7(3)).

[35] Using the same reasoning as set out above concerning procedural applications, I find that I may properly consider an application to extend the time allowed for filing the records of appeal. This would be a procedural application made pursuant to rule 2.10(1) of the CAR. As an appeal filed with permission, it would be properly before the court and procedural applications could be made in pursuance thereto.

[36] That discussion was, as premised, advanced as an alternative to my original finding. The orders will be made according to the original finding.

Order

[37] In light of the fact that we are in the long vacation, a slight adjustment to the times stipulated by rule 2.4(1) must be made. The orders are, therefore, as follows:

1. The appeals shall proceed as procedural appeals.
2. The time limited for the applicant to file and serve the written submissions in support of the appeals is hereby extended to 17 September 2012.

3. Failure to comply with order 2 hereof shall render the appeals as struck out without need for any application by the respondents or the Registrar.
4. All other times set by rule 2.4 shall apply.
5. There shall be no order as to costs.