JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31/2003
MOTION 1/07

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. DUKHARAN, J.A. (Ag.)

BETWEEN	PETER HADDAD	APPELLANT/APPLICANT
AND	DONALD SILVERA	RESPONDENT

Hilary Phillips, Q.C. and **Kevin Williams** instructed by **Grant Stewart Phillips & Company** for the appellant.

Daniella Gentles instructed by **Livingston Alexander & Levy** for the respondent.

February 14, 15, 16, 22nd and July 31, 2007

SMITH, J.A:

On April 24, 2003, the applicant filed an appeal against an order of Anderson J setting aside a default judgment. On March 30, 2005, the Registrar notified the parties that the transcript of notes of evidence and reasons for judgment were available on payment of the prescribed fees. This notification was done pursuant to Rule 2.5 (1) (b) (iii) of the Court of Appeal Rules (the Rules). The parties' attention was drawn to Rule 2.7. Of particular relevance is Rule 2.7(3)(i) which provides:

"Within 28 days of the receipt of –

(i) the notice under rule 2.5 (1)(b)...

> the appellant must prepare and file with the registry four sets of the record for the use of the court..."

The appellant/applicant did not comply with this provision. On March 22, 2006, the appellant/applicant filed a Notice of Application for Court Orders seeking an extension of time to file the Record of Appeal and Submissions. This application was made under Rule 1.7 (2) (b) which reads:

> "Except where these Rules provide otherwise, the Court may --
>
> (a)...
>
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

In an affidavit filed on March 22, in support of the application, Mr. Kevin Williams stated:

> "1...
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> 2...
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> 3. That on the 31st March 2005 Mr. Kipcho West, an Attorney and Associate employed to the firm of Grant, Stewart, Phillips & Co. collected the Registrar's Notice to the parties that the transcript was available and should be collected and four (4) sets of the Record of Appeal should be filed within twenty-eight (28) days of the 30th March 2005, the date of the Registrar's Notice.

4. That the parties were having some discussions that appeared would have led to a settlement. That the settlement never materialized and the Appellant by an oversight did not file the Records of Appeal in accordance with Rule 2.7 until the 5th December 2005, which was outside the time limited for filing the Record of Appeal. This aspect of this application is to regularize the filing of the Record of Appeal.

5. That the Attorney with conduct of the (sic) this matter is no longer with the firm and it is on examination of his files that I discovered that the Written Submissions and List of Authorities had not been filed in the matter.

6. That the Written Submissions have not been filed because of an oversight, as it took some time for me to assess all the files left behind by Mr. West. That when this was discovered I realized that the time to file the Submission and List of Authorities had also expired.

7. That in the circumstances I verily believe that an extension of twenty-eight (28) days will suffice for the filing of the Written Submissions and List of Authorities. That as no date is yet set for the hearing of the Appeal I do verily believe that the Respondent will not be prejudiced by this Application.

8. That I am advised by the Appellant and do verily believe that he is still serious about pursuing this Appeal to its conclusion.

9. That in the premises I humbly pray that this Honourable Court will grant the grant the (sic.) extension sought herein."

On April 26, 2006 this procedural application was considered by Cooke J.A. who held:

"(1) The applicant has for approximately eight (8) months neglected to have regard for the imperative direction of Rule 2.7(3).

(2) The reason given:

(i) Settlement discussions

(ii) That the attorney-at-Law (sic) who had conduct of the case having left the firm are not such to persuade me to grant this application. In holding this view, I am cognizant of the overriding objections (sic.) underpinning the Civil Procedure Rules in particular the expeditious and fair criterion.

(3) The application is refused."

The applicant has applied to this Court by Way of Amended Notice of Application for Court Orders dated January 5, 2007 and filed January 24, 2007 for the following orders:

"(1) That the Order of the Honourable Mr. Justice Cooke JA (sic.) dated 26th April 2006 be discharged or varied.

(1) An extension of twenty eight (28) days to file the Appellant's Written Submissions and List of Authorities.

(2) That the time limited for filing Record of Appeal be extended to 5th December 2005 and the Record of Appeal filed on the 5th December 2005 do stand.

(3) Costs to be costs in the cause.

(4) Such further and/or other relief as this Honourable Court seems just".

An affidavit in support was sworn to by Mr. Williams and filed on the 5th January, 2007. The only difference between the two affidavits is in paragraph 7 of the latter which reads:

> "That by Notice of Application for Court Orders dated March 22 2006, the Appellant sought an extension of time to file the Written Submissions and the List of Authorities and to regularize the filing of the Record of Appeal. That Application was considered on paper by the Hon. Mr. Justice Cooke, and by Order dated 26th April 2006, that Application was refused..."

Miss Phillips Q.C. for the applicant submitted that Cooke, J.A. in the exercise of his discretion failed to take into consideration the merits of the applicant's appeal and any question of prejudice to the respondent. She submitted that there is no evidence of likely prejudice to the respondent. She relied on ***Leymon Strachan v the Gleaner Co. et al*** SCCA Motion No. 12/99 delivered December 6, 1999 and ***Finnegan v Parkside Health Authority*** [1998]1All ER 595. Learned Queen's Counsel contended that the absence of a good reason for delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. The Court, she argued, was required to consider all the circumstances of the case in the context of the overriding objective.

The overriding objective she submitted requires that the Court forms at least a preliminary view on the likely outcome of the matter if it were to exercise its discretion in favour of the applicant. Miss Phillips referred to an affidavit by the respondent which, she said, shows that the respondent

acknowledged that he was indebted to the applicant in the sum of $5,000,000.00. This affidavit she said is at page 16 of the Record which was filed on the 5th December, 2005. I should state here that the filing of the Record is irregular and that the respondent's affidavit is not before this Court. Learned Queen's Counsel submitted that by virtue of the respondent's acknowledgement there is a realistic prospect of the appeal succeeding. Accordingly, she submitted, if the overriding objectives were to be exercised with a view to doing justice as between the parties and deal with the case justly, the court's discretion should be exercised in the appellant's favour.

Miss Gentles for the respondent contended that in applying for an extension of time the appellant ought to provide some satisfactory explanation for the delay upon which the court can exercise its discretion. A number of decisions of this Court, she said, have underscored the principle that there must be adequate explanation of the delay. Counsel for the respondent referred to the chronology of events and the affidavit evidence and submitted that there is no satisfactory explanation for the delay in filing the Record or in applying to this Court to discharge Cooke, J.A.'s order. The reason for the delay she argued is of paramount importance in the application for the extension of time. She referred to the following cases among others - ***Benjamin Patrick v Frederika Walker***

[1969]11J.L.R 303; ***Central Soya of Jamaica Ltd. v Junior Freeman*** [1985] 22 JLR 152 and ***City Printery v Gleaner Co. Ltd.*** [1968] 10 JLR 506.

Miss Phillips in reply sought to distinguish the cases relied on by the respondent. She further submitted that the cases were decided before the Rules came into force and are no longer good law in this regard.

Analysis

The following facts are not disputed.

(1) The skeleton argument should have been filed on or before the 21st April, 2005 that is, 21 days of receipt of the Registrar's Notice under Rule 2.5(1)(b) – see Rule 2.6(1).

(2) Up to the time of the hearing of the application the skeleton arguments have not been filed.

(3) The Record of Appeal should have been filed on or before the 28th April, 2005. i.e. 28 days after the Registrar's Notice. It was filed on the 5th December 2005, that is to say, just over 7 months late.

(4) The reasons given for the delay are:

(i) The parties were in discussion with a view to settling the matter. (These discussions ended on May 2, 2005)

(ii) The attorney-at-law who had conduct of the matter left the firm.

(5) The application to this Court to discharge the order of Cooke, J.A and to grant an extension of time was filed over eight (8) months after the order was made.

(6) No reason for the delay in coming to this Court was given.

By virtue of Rule 2.11 (2) any order made by a single judge may be varied or discharged by the Court. The Court has an untrammelled discretion. This discretion must be exercised judicially. There must be some material upon which the Court can exercise its discretion (see ***Patrick v Walker)*** (supra). The question is: In what circumstances should the court extend the time for compliance with a rule? A number of cases decided in the "Pre 2002 CPR" era held that in exercising its discretion the Court should 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.

The cases also established that notwithstanding the absence of a good reason for delay the Court was not bound to reject an application for an extension of time as the overriding principle was that justice had to be done. See ***Leymon Strachan v Gleaner Co. Ltd. et al*** (supra) at p. 20.

In construing Order 8 of the English RSC which gave the Court an untrammelled discretion to extend the validity of a writ, the House of Lords

in ***Kleinwort Benson Ltd. v Barbrak Ltd.*** [1987]1 A.C. 597 held that there must be implied into the rule a condition that the power to extend should only be exercised for "good reason" – see the speech of Lord Brandon at p. 622 C-D. That was the position before the CPR came into force. What is the position under the new rules? In a number of cases the view was expressed that although the pre CPR principles are not binding for the purposes of interpreting the CPR they remain relevant not as rules but as matters which must be considered in an exercise of the Court's discretion. The principles by which the Court should determine whether to extend time were considered by the English Court of Appeal in ***Hashtroodi v Hancock*** [2004] 3 All E.R. (D) 530. The Court stated that "it should usually be possible to interpret the CPR without recourse to case law under the former rules" since the CPR "is a self-contained procedural code." In para. 17 the Court referred to the English CPR 7.6(3) which empowered the Court to grant extension of time to a claimant who applied after the end of the specified period only if certain conditions were met and contrasted it with CPR 7.6 (2) which had no reference to any condition. The Court observed that it could not have been intended that CPR 7.6(2) should be construed as being subject to a condition that a "good reason" must be shown for failure to serve within the specified time. The Court then concluded:

> "18. In the absence of any such condition, therefore, the power must be exercised in accordance with the overriding objective: (see CPR 1.2 (b)). What does that mean in practice? We have no doubt that it will always be *relevant* for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This has nothing to do with the fact that under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It is because the overriding objective is that of enabling the court to deal with cases "justly", and it is not possible to deal with an application for an extension of time under r.7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period. As a matter of common sense, the court will always want to know why the claim form was not served within the specified period. As Mr. Zuckerman says at (p: 180) para 4.121):
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> "For it is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed."

It was also the view of that Court that "whereas under the previous law, a plaintiff who was unable to show a good reason for not serving in

time failed at the threshold, under the CPR a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted... The weaker the reason, the more likely the court will be to refuse to grant the extension."

It was emphasized that "one of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure." The Court quoted Lord Woolf in ***Biguzzi v Rank Leisure plc*** [1999] 1 W.L.R. 1926 at p. 1933D:

> "If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

In my view the above excerpts from the judgment are instructive. It is beyond debate that "one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with the proper expedition."

The overriding objective principle of Part 1 of the Civil Procedure Rules (CPR) applies to rules of this Court – see Rule 1.1 (10) (a) of the Rules. Generally speaking the rules of the Court must be obeyed. The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on

which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules. A question which has often been raised is whether a party who has substantially exceeded the time limit set by the rules for a step to be taken is entitled without proferring any reason for the delay to have the time extended if:

(i) there is no evidence of likely prejudice; and

(ii) the defaulting party gives an undertaking to pay any costs occasioned by his delay?

In giving a negative response to such a question, Lord Edmund Davies L. J. in ***Revici v Prentice Hall Inc.*** [1969] 1 All ER 772; [1969]1 W.L.R. 157 said:

> "... the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted..."

This, in my respectful opinion, is a correct statement of the law applicable in this country. As has already been stated the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered. The Court in ***Hancock's*** (supra) case did not think it prudent to produce a checklist of relevant factors in relation to applications for extension of time. The guiding principle which can be extracted from that

case is that the Court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor.

I now turn to the circumstances of the instant case. I must first express the view that although the principles enunciated in ***Hashtroodi v Hancock*** (supra) as regard an application to extend time were in reference to the rules applicable to the trial Court they equally apply to the rules of this Court save that the approach of this Court is different. As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly. The Court in my view should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application. In ***United Arab Emirates v Abdelghafar*** [1995] I.C.R 65 Mummery J said:

> "The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals." (emphasis mine).

The above statement was referred to with approval in ***Aziz v Bethnol Green City Challenge Co. Ltd.*** [2000]1R.L.R. 111.

Miss Phillips, Q.C. for the applicant complained that Cooke J.A. did not take into consideration the merits of the applicant's appeal and the question of prejudice to the respondent. In refusing to extend time Cooke J.A. stated that he was "cognizant of the overriding objectives underpinning the Civil Procedure Rules in particular, the expeditious and fair criterion". Only the affidavit of Mr. Kevin Williams filed on March 22, 2006, was placed before the single judge in support of the application. There was not one scintilla of evidence in respect of the merit of the applicant's appeal or of the lack of any likely prejudice to the respondent. No material was placed before the single judge in respect of these matters for his consideration.

The reasons proffered for the delay were that (i) the parties were having discussions with a view to settling the matter and (ii) the attorney-at-law who had conduct of the matter had left the firm. There was no affidavit from the attorney, who had left, as to the reason for non-compliance on his part.

Cooke J.A. stated that the reasons given were not such as to persuade him to grant the application. The applicant has not shown that

Cooke J.A. wrongly exercised his discretion. We see no reason to discharge or vary his order.

Miss Gentles also argued that the Court should not entertain the applicants' application to discharge or vary Cooke J.A.'s order on the ground that no reason was given for the long delay in making the application. Cooke J.A's order refusing to enlarge the time was made on April 26, 2006. The Application to discharge his order was filed on January 24, 2007 that is, some nine (9) months after the order was made. No reason was given for the long delay in making the application to this Court. The Court of Appeal Rules do not state any time period within which an application to discharge or vary the single judge's order shall be made. In such a case the application to discharge or vary should be made within a reasonable time. The question as to what constitutes a reasonable time must be determined by reference to the overriding objectives of the rules. However, in my judgment, unless there are exceptional circumstances, an application to discharge the order of the single judge refusing to extend time should be made promptly.

If not made promptly the applicant must give reason for not acting promptly. Failure to give reason for the undue delay, is, in my view, fatal. As was emphasized in ***Hashtoodi v Hancock*** (supra) the overriding objective is that of enabling the Court to deal with cases "justly". It is not possible to deal with an application for extension of time or, I may add, an

application to discharge an order refusing to extend time, justly without knowing why the claimant had failed to comply with the rule or to act promptly. I am in no doubt that the applicant in this case has failed to act promptly in making his application to this Court. The absence of any explanation for this failure, on the facts of this case, is decisive.

Accordingly, the application for orders to discharge the single judge's order and to extend the time for the filing of the Record of Appeal is dismissed. The matter is to proceed to trial.

HARRIS, J.A.

I have read the judgment of Smith, J.A. in draft. I agree with his reasons and conclusions and I have nothing further to add.

DUKHARAN, J.A. (Ag.)

I too agree.

SMITH, J.A.

ORDER:

The Application is refused. The order of Cooke, J.A. is affirmed. Costs to the respondent to be taxed if not agreed.