JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 107/2013

APPLICATION NO 63/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL (Ag)

BETWEEN	**GEORGE RANGLIN**	**1ST APPLICANT**
AND	**NIPO LINE LIMITED**	**2ND APPLICANT**
AND	**NIPO LINE AUTO IMPORTS LIMITED**	**3RD APPLICANT**
AND	**ANDREW RANGLIN**	**4TH APPLICANT**
AND	**FITZROY HENRY**	**RESPONDENT**

AND

APPLICATION NO 94/2014

BETWEEN	**FITZROY HENRY**	**APPLICANT**
AND	**GEORGE RANGLIN**	**1ST RESPONDENT**
AND	**NIPO LINE LIMITED**	**2ND RESPONDENT**
AND	**NIPO LINE AUTO IMPORTS LIMITED**	**3RD RESPONDENT**

AND ANDREW RANGLIN 4TH RESPONDENT

Miss Kashina Moore instructed by Nigel Jones & Company for the applicants in Application No 63/2014 and the respondents in Application No 94/2014

Ms Jacqueline Cummings instructed by Archer Cummings & Company for the applicant in Application No 94/2014 and the respondent in Application No 63/2014

24 June and 14 November 2014

PHILLIPS JA

[1] Before this court are two applications: the first in time, which is the application filed by George Ranglin, Andrew Ranglin, Nipo Line Auto Imports Limited and Nipo Line Limited ('the Ranglins and Nipo Line companies'), seeks to have the appeal filed by Fitzroy Henry on 18 December 2013 struck out as being filed out of time; the second is an application by Mr Henry seeking to have his notice of appeal filed to stand as filed in time and an extension of time to file and serve his skeleton arguments on the Ranglins and Nipo Line companies within seven days of the order of this court.

[2] The appeal from which the applications emanate arises in this way. A claim was filed by Mr Henry (2008 HCV 05233) against the Ranglins and Nipo Line companies seeking to recover a debt of $51,000,000.00. The matter was tried on 19 and 20 May 2010 and judgment was reserved, but prior to the delivery of the judgment, Mr Henry and Mr George Ranglin entered into a settlement on 30 July 2010, and the minute of order was consequently endorsed, "Matter settled in chambers in terms endorsed on counsel's brief". By letter dated 12 October 2010, Mr Aon Stewart of Archer Cummings

and Company wrote on behalf of Mr Henry to Messrs Nigel Jones and Company reminding them of the settlement reached in the claim and that the first of four payments under the agreement was due on 31 October 2010. Mr Stewart having received no response again wrote to Messrs Nigel Jones and Company demanding that the sum due be paid. In response to this letter, by letter dated 23 November 2010, Mr Nigel Jones indicated that the Ranglins and Nipo Line companies were experiencing "severe financial crisis" but that they were in the process of refinancing and restructuring so as to "make good their payments". He indicated that they were seeking an extension to 31 December 2010 and 28 February 2011 to pay the sum which had been due on 31 October 2010.

[3] No sums were forthcoming from the Ranglins and Nipo Line companies, and on 12 May 2011, Mr Henry commenced proceedings by fixed date claim form (2011 HCV 03249) claiming against Mr George Ranglin and Nipo Line companies a declaration that they had breached an agreement between the parties made on 30 July 2010 and seeking orders for the payment of the sums that had been agreed to be paid under the agreement. He also sought an order that if the Ranglins and Nipo Line companies failed to pay the sums, then he would be at liberty to seize their assets or have Mr George Ranglin in his personal capacity and in his capacity as director of Nipo Line companies be committed to prison for non-payment or non-compliance. Mr Henry also claimed interests and costs. In his affidavit in support, Mr Henry set out the history of the matter including his filing of the 2008 claim, the settlement arrived at and the subsequent default in payment of the sums agreed and stated that he had not sued Mr

Andrew Ranglin as he resides overseas and was not present when the agreement was reached. He stated also that he had no confidence that Mr George Ranglin and the Nipo Line companies were taking the agreement seriously.

[4] Mr George Ranglin in his affidavit in response stated that at all material times the Ranglins and Nipo Line companies had contended that the Ranglins were wrongly sued and that he was not present when the agreement was entered into between Mr Henry and Nipo Line Limited. He stated that at no time had he changed his position that he was not a party to the proceedings. He further stated that no payment had been provided because Nipo Line Limited remained closed and had no money to pay. Mr Henry in his affidavit in response reiterated that the agreement entered into on 30 July 2010 was between himself and Mr George Ranglin and that during the discussions leading up to the agreement, Mr Ranglin had not indicated that he was representing Nipo Line Limited and not himself personally.

[5] The claim came on for hearing on 11 July 2012 before Rattray J who ordered as follows:

> "Fixed date claim form refused. Matter already dealt with in claim number 2008 HCV 05233 and settled in terms endorsed on counsel's brief."

Mr Henry then filed a judgment summons application on 31 October 2012 against the Ranglins and Nipo Line companies in suit 2008 HCV 05233. In an affidavit sworn to on 31 October 2012 he stated that up to the date of the affidavit the Ranglins and Nipo Line companies had made no effort to liquidate the sum due and owing to him and that

in the light of the letter dated 23 November 2010, he believed that the Ranglins and Nipo Line companies did have the means to pay him but had deliberately declined to do so. He also stated that he had paid his monies to the Ranglins and Nipo Line companies on six occasions and believed that it was reasonable for him to request that they repay him.

[6] However, before the hearing of the judgment summons, a notice of preliminary objection was filed on behalf of the Ranglins and Nipo Line companies. The objection was to the judgment summons proceedings being used as a means of enforcing the settlement arrived at. The objection was based on the following grounds:

> "1. The terms of the settlement were not made a part of an order and/or recorded by the Court.
>
> 2. The law requires that where the terms of a settlement are not disclosed to the Court and/or are settled in terms endorsed on Counsel's brief a party must bring new proceedings to enforce the Agreement.
>
> 3. These judgment summons proceedings are an improper use of the court's resources."

The judgment summons proceedings having come on for hearing before Master Lindo as she then was, the learned Master, on 5 December 2013, upheld the preliminary objection holding that the judgment summons proceeding was procedurally incorrect as what was being sought to be enforced was an agreement by the parties that the matter had been settled in terms endorsed on counsel's brief and the matter came to an end by this agreement. The agreement was not made a formal order of the court, nor was

there any indication of what, if any, the judgment debt was. The learned Master stated that the predominant way to enforce a settlement agreement was through the filing of a claim alleging breach of an agreement. She also expressed the view that a court which is asked to deal with the execution of a judgment cannot get jurisdiction which it would not otherwise possess mainly on account of the fact that a settlement agreement has taken place before it.

[7] Mr Henry filed a notice of appeal on 18 December 2013 containing five grounds of appeal, which in essence, complained that the Master had erred in finding that: the settlement endorsed on counsel's brief could only be endorsed by initiating a fresh action; a judgment summons hearing cannot be invoked to enforce the terms of the settlement; and the Master had erred when she upheld the preliminary objection, which dealt with res judicata and not the jurisdiction of the Master to enforce the terms on counsel's brief.

[8] No record of appeal or skeleton arguments were filed and on 17 April 2014, the Ranglins and Nipo Line companies filed the application mentioned as being first in time in para [1]. The grounds for the application were:

> "1) The decision of the honourable Master Lindo, as she then was, that the Judgment Summons filed cannot be used to enforce a settlement was delivered on December 5, 2013.
>
> 2) The Appellant obtained leave to appeal this decision on December 5, 2013.
>
> 3) The Appellant had seven (7) days to file its Notice of Appeal in accordance with rule 1.11(1) of the Court

of Appeal Rules of Jamaica as it was a procedural appeal.

4) The Notice of Appeal should have been filed on December 17, 2013 but was filed on December 18, 2013.

5) The Appellant did not file and serve written submissions in support of the appeal with the notice of appeal served on the Respondent's [sic] Attorneys-at-Law in accordance with rule 2.4(1) of the Court of Appeal Rules."

The grounds relied on by Mr Henry in support of his application filed on 6 June 2014 were:

"1. That the Appellant/Applicant failed to file His Notice of Appeal within the stipulated time as prescribed by the Court of Appeal Rules.

2. That the Appellant/Applicant failed to file and serve his Skeleton Arguments herein.

3. The Respondents will not be prejudiced should the Orders herein be granted.

4. Pursuant to rule 26.8 of the Civil Procedure Rules and the overriding objective [sic]."

Submissions

[9] On the day of the hearing of the applications, we decided that we would hear submissions in support of the application to extend time before the arguments in support of the application to strike, since if the former were successful, the latter would necessarily fail and conversely if the former failed, it would not be necessary to consider the latter.

[10] Notwithstanding the apparent acceptance of the position that the appeal had been filed out of time from a perusal of the application itself, before this court Ms Cummings, on Mr Henry's behalf, submitted that the appeal was interlocutory and that as is required by the law, permission had been granted by Master Lindo. Pursuant to the Court of Appeal Rules (CAR), counsel submitted, the appeal should therefore have been filed within 14 days of the date on which permission was granted, which was 19 December 2014. The appeal having been filed on 18 December, it was therefore filed in time.

[11] In the alternative, she submitted that if the appeal was out of time, an extension of time was being applied for, for the notice of appeal to stand as having been filed in time. She submitted further that at the time when the application to strike out was brought, the Master had not yet delivered her reasons, and so, the application to strike out on the basis that Mr Henry had failed to file his skeleton arguments with the notice and grounds of appeal was premature. Counsel indicated that Rattray J, in considering the new suit filed in 2011 that had been brought by Mr Henry to recover the funds due to him on the settlement agreement, had indicated that according to **Green v Rozen and Others** [1955] 2 All ER 797, that claim should have been brought within the original claim. Counsel referred to **Elita Flickenger v David Preble and Another** [2013] JMCA App 1 and the criteria for extension of time as applied in that case and submitted that the delay had been over four months; the explanation for the delay in filing the skeleton arguments was that Mr Henry had been awaiting the judgment of Master Lindo; the action enforcing the agreement should be brought in the same suit;

and there was no prejudice to be suffered as the Ranglins and Nipo Line companies had not paid any money.

[12] In written submissions, on behalf of the Ranglins and Nipo Line companies, counsel referred to rules 1.1(8) and 1.11(1), which, respectively, define a procedural appeal and set out the time limits for filing appeals. Counsel submitted that the order made by Master Lindo did not decide the substantive issues in the claim and therefore an appeal from her decision would be procedural. In support of this submission, she relied on **Abdulla C Marzouca Limited and Marzouca v Crooks** SCCA No 7/2007, delivered 11 May 2007. In oral submissions, in response to an enquiry from the court as to whether an appeal being procedural, it would be subject to the requirement of obtaining permission prior to the appeal being filed, Miss Moore submitted that the matter being a procedural appeal, even when permission to appeal has been obtained, if required, the appeal must be filed within seven days of the grant of the permission.

[13] It was also submitted in writing that Mr Henry was required to file his appeal on 17 December, and so the appeal had been filed one day late. No extension of time to file the notice of appeal had been applied for prior to the filing of the notice. It was further submitted that the failure to file the notice of appeal within time and without an order granting an extension of time meant that the notice of appeal was not properly before the court. In oral submissions, Miss Moore, relying on **National Commercial Bank v International Assets Services Limited** [2013] JMCA Civ 9, submitted that the appeal having been filed outside the time limited for filing it, it was not a valid appeal. Therefore, she submitted, in considering what is the period of delay, the valid

period would be the time between when the order was made on 5 December 2013 and when the application was filed, that is 6 June 2014, which would make it six months from the time when it ought to have been filed, or at best, some five and a half months. Counsel also submitted that Mr Henry had not complied with rule 2.4 of the CAR dealing with procedural appeals, which requires that written submissions be filed with the notice of appeal. She submitted also that the application was not filed until three weeks after the delivery of the written reasons by the Master.

[14] In written submissions, it was also submitted that even though the appeal was filed a day late, this court ought not to consider whether the time within which to file the appeal should be extended as there is no merit in the appeal. Counsel relied on **Salter Rex v Ghosh** [1971] 2 All ER 865 where, it was submitted, the court stated that where there is no merit, the extension of time ought not to be granted. Miss Moore submitted that this court in discussing the principles of law relevant to the grant of an extension of time has repeatedly stated that merit is a key consideration of the court. She referred to **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** Motion No 12/1999, judgment delivered 6 December 1999, **Jamaica Public Service Co Limited v Rose Marie Samuels** [2010] JMCA App 23, **Peter Haddad v Donald Silvera** SCCA No 31/2003 delivered 31 July 2007 and **Primrose Cohen v Sterling and Sterling** [2014] JMCA App 6.

[15] In relation to the merits, counsel submitted that the claim filed was settled by Mr Henry and Nipo Line Limited for a lesser sum than that claimed by Mr Henry and that it was this agreement that Mr Henry was seeking to enforce. The law is clear, counsel

submitted, that a suit settled by compromise brings that suit to an end. For this submission, counsel referred to and relied on **McCallum v Country Residences Limited** [1965] 1 WLR 657, which, she submitted, had been applied by this court in **Atlas Bass v Zabelle et al** SCCA No 8/1991, delivered 8 July 1991. Counsel submitted that the learned Master was therefore correct in her decision that the judgment summons proceedings could not be used to enforce the settlement agreement.

[16] It was further submitted that the law is clear as to how cases settled on terms endorsed on counsel's brief may be enforced. Counsel referred to the dictum of Slade J in **Green v Rozen** that where the claim is settled upon terms endorsed on counsel's brief, the court has made no order and the terms of the original claim has been superseded by the agreement between the parties with the consequence that if the terms of the new agreement are not complied with, the injured party must seek his remedy on the new agreement. Counsel also relied on **Atkinson and Another v Castan and Segura** [1991] WL 839457, **Anima v Ahyeye (Substituted for Kwame Dwaa, deceased)** [1956] AC 404 and **Magwall Ja Limited and Others v Glenn Clydesdale and Another** [2013] JMCA Civ 4. Counsel submitted that Mr Henry was obliged to seek to enforce any agreement he stated was made between himself and any or all of the Ranglins and Nipo Line companies in a new claim. Counsel further submitted that Mr Henry having sought to do so in the 2011 claim and having been denied relief, could not revive the present suit to enforce the settlement within the suit.

[17] In oral submissions, Miss Moore submitted that the Ranglins and Nipo Line companies would be greatly prejudiced if they are required to defend this appeal.

Referring to the affidavit of Mr George Ranglin, filed in response to the affidavit of Mr Henry in the 2011 claim, it was submitted that the agreement was between Mr Henry and Nipo Line Limited. She argued that Mr Henry is unsure about the party with whom he had the agreement and therefore to ask the Ranglins and Nipo Line companies to respond to an appeal which has no merit would be highly prejudicial.

[18] In a brief reply, Miss Cummings submitted that Mr George Ranglin and Mr Henry had arrived at the agreement together. There is no dispute that Mr George Ranglin is the principal of the Nipo Line companies, she submitted. In response to the authorities, she submitted that **Magwall** is distinguishable because it concerned the interpretation of a mediation agreement, which would have to have been the subject of a separate suit.

Analysis

[19] It seems to me that there are three issues which arise for determination:

(i) Is the appeal procedural and/or interlocutory?

(ii) Whether an extension of time to file the appeal is necessary, and if so, should it be granted?

(iii) Whether an extension of time should be granted to file skeleton arguments in support of the appeal

Issue (i)–Is the appeal procedural and/or interlocutory?

[20] A procedural appeal as defined by rule 1.1(8) of the CAR is one that does not directly decide the substantive issues in a claim, and the rule provides certain matters which are to be regarded as exceptions. In my view, by the use of the word "claim", the rule seems to be concerned with proceedings that have occurred within the pendency of a matter, that is, before the matter is determined. After the matter is determined, it is no longer a claim, but has evolved into a judgment. A judgment summons is a tool used to enforce a judgment after the judgment has been entered on the claim. It is my view, therefore, that the appeal is not a procedural one.

[21] It is now necessary to consider whether Miss Cummings' submission that the matter is interlocutory has merit. A similar approach was adopted by Brooks JA in **Hoip Gregory v Armstrong; Hoip Gregory v O'Brien Kennedy** [2012] JMCA App 21, in which, although the learned judge found that the appeals were procedural and no skeleton arguments had been filed with the appeals as required by the CAR, he considered the appeals to be interlocutory for which permission had been obtained prior to their filing, and for which he therefore had the jurisdiction to extend the time for filing skeleton arguments.

[22] It is well accepted that the approach to be adopted in determining whether an order is interlocutory or final is the application approach. That approach was applied by this court recently in **JPS v Rose Marie Samuels**. In that case, Morrison JA had to decide whether an order made on a summary judgment application is interlocutory or

final. Morrison JA referred to the dictum of Lord Denning MR in **Salter Rex** where the learned Master of the Rolls approved the application approach as stated by Lord Esher in **Salaman v Warner and Others** [1891] 1 QB 734, that is, the nature of the application to the court, and not the nature of the order which is made, determines whether the matter is interlocutory. In that case, the order being appealed was an order for a new trial, and Lord Denning in applying the application test stated that if the application for the trial were granted, it would have been interlocutory and so equally if it had been refused, it would have been interlocutory. Morrison JA also considered **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** SCCA NO 54/1997, delivered 18 December 1998, in which this court in adopting the application approach, stated the test as established in **Salaman v Warner** to be if the decision being appealed, "whichever way it is given, will, if it stands, finally dispose of the matter in dispute" it is final; however, if, on the one hand, it is given one way, it will finally dispose of the matters in dispute, but if given the other way, the action will continue, then it is interlocutory. Applying the application approach, Morrison JA held that if an application for summary judgment is refused, the order would be interlocutory and so equally, where it is granted, the judge's order remains interlocutory.

[23] Miss Moore has relied on **Abdulla**, which involved an application for an extension of time to file a notice of appeal in what the court considered to be a procedural matter. There is dicta in the case which would seem to suggest that based on rule 1.11 of the CAR, once an appeal is considered procedural, it would not be

interlocutory; it would have to be filed within seven days of the order being appealed and no permission for leave would be necessary.

[24] It is my view that in order to determine the approach to filing an appeal, particularly with regard to obtaining the leave of the court to do so, one must have regard to the statute which confers the right to appeal on a litigant and the corollary right on this court to hear and determine such appeals. Rules of court created pursuant to statute are also important, but must be read subject to the statute. The Judicature (Appellate Jurisdiction) Act (JAJA) in section 10, provides that this court may hear appeals from any judgment or order in all civil proceedings. This power is, however, subject to section 11, subsection 1(a) – (e) of which provides for cases in which there is no right of appeal and subsection (1)(f), which provides that, except in the matters/circumstances listed in that paragraph, there shall be no appeal from an interlocutory order or judgment unless the permission of the court is obtained. It appears that the statute envisages two types of appeal: interlocutory, as explicitly expressed in section 11, and other appeals, which may be regarded as final appeals. Permission is required for the former, but not the latter.

[25] The statute does not provide a definition of "interlocutory", but as I have attempted to demonstrate, case law has provided some guidance on how this determination is to be made. Based on the application approach, it is my view that regardless of whether the CAR would seem to create a separate category of appeals known as procedural appeals, procedural appeals would by their very definition, being appeals from orders that do not directly decide the substantive issues in the case,

readily fall into the category of interlocutory appeals. For, it seems to me that since the order being appealed in the procedural appeal does not directly dispose of the substantive issues in the claim, the order, "whichever way it is given", could not finally dispose of the matters in dispute between the parties. Consequently, although the rules would seem to suggest that procedural appeals do not need permission, this is contrary to the intent of the statute, and as Harris JA stated in **Vincent Gaynair & Ors v Negril Beach Club Ltd** [2012] JMCA Civ 25, "[a] rule cannot operate to defeat the intent of the legislature".

[26] With the greatest of respect to the court in **Abdulla**, therefore, it is my view that rule 1.11(1)(a) of the CAR requiring the procedural appeal to be filed within seven days, must be read subject to the statutory requirement that permission to appeal should first be obtained, it being an interlocutory matter. It may be said that the decision in **Abdulla** was reached without there being full arguments on and consideration of the import of the statutory provisions. I should add that while I consider all procedural appeals to be interlocutory, not all interlocutory appeals are procedural. For example, the grant or refusal of an application to appoint a receiver is an interlocutory matter, although it is exempted from the requirement for permission; however, it would not be procedural as it is exempted from the definition of "procedural appeal", and would be governed by rule 1.11(1)(c) of the CAR.

[27] Applying the application approach to the order refusing the judgment summons, it is my view that if the judgment summons had been granted, it would have been final, and so equally where it is refused, it is final. In other words, if it had been granted, it

would have disposed of the matter between the parties, it being enforcement proceedings on a judgment, and if it had been refused, it equally would have disposed of the matter. It is therefore my view that the order was a final one, and not interlocutory, as argued by Miss Cummings. That would dispose of the first issue.

Issue (ii) Whether extension of time to file appeal is necessary, and if so should it be granted?

[28] The time for filing and serving a notice of appeal in the CAR is set out as follows:

> "1.11 (1) The notice of appeal must be filed at the registry and must be served in accordance with rule 1.15-
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
>
> (b) where permission is required, within 14 days of the date when such permission was granted; or
>
> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant."

The rule also states that the court below may extend the times set out above.

[29] Having found that the order made by Master Lindo was final and not interlocutory, permission to appeal would not have been required, and not being a procedural appeal, in my view the notice and grounds of appeal would have to be filed at the registry and served within 42 days of the date when the order or judgment appealed against was served on Mr Henry. That would have been by 17 January 2014.

The appeal therefore filed on 18 December 2013 would have been filed in compliance with rule 1.11(1)(c) of the CAR and it would not be necessary to file any application for an extension of time to file the notice of appeal. As a consequence the real question for consideration in the appeal is the issue which I have identified as issue (iii).

Issue (iii) Whether an extension of time should be granted to file skeleton arguments.

[30] As indicated, the notice and grounds of appeal were filed on 18 December 2013. The CAR state, that once the appeal is a procedural appeal, rule 2.4 is applicable, which requires that submissions must be filed with the notice of appeal. In this case, the appeal not being a procedural appeal, rule 2.4 is not applicable. Therefore, as no oral evidence had been taken, within 21 days of the filing of the notice and grounds of appeal, the appellant must file with the registry and serve on all other parties, "a skeleton argument" (see amended rules 2.5 and 2.6 of CAR). The skeleton argument ought therefore to have been filed on 9 January 2014. That was not done. The application for extension of time to file the same was filed, as indicated, on 6 June 2014. Counsel for Mr Henry submitted that they were awaiting the reasons from the learned Master, which were not delivered until May of 2014. But, even before the application for an extension of time to file the skeleton arguments was filed, the Ranglins and Nipo Line companies had filed and served on Mr Henry their application to strike out the appeal which no doubt triggered Mr Henry's application.

[31] One of the court's general powers of management is 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 (rule 1.7(2)(b). This procedure is utilised generally in respect of applications to access the court, for example applications to extend the time for the filing of the notice and grounds of appeal. These applications are heard by the Court of Appeal only (see rule 1.7 which refers to a power to be exercised by the court as against the single judge of appeal). So too are applications for permission to appeal, as pursuant to section 11(1)(f) of JAJA that jurisdiction lies only with the Court of Appeal. The specific matters which can be heard by the single judge of appeal are set out in rule 2.11 of the CAR where the application to extend time to file skeleton arguments would be captured under the rubric "any other procedural application" (rule 2.11(1)(e)), as that application is one relating to the process of the appeal through the courts and not in respect of the access to the court's jurisdiction. It is my view that the courts have viewed these differing applications accordingly and applied a somewhat different focus and a less stringent approach depending on the category of the application.

[32] There are several authorities from this court setting out the criteria for the exercise of the court's discretion when dealing with applications for extension of time to access the court, beginning with the leading case of **Leymon Strachan v The Gleaner** which dealt with an application to extend the time within which to appeal, and which was decided prior to the Civil Procedure Rules 2002, but which has been endorsed by the court since the promulgation of the rules. Panton JA (as he then was) set out the legal position and laid down the approach which ought to be taken, in this way:

"THE LEGAL POSITION

In seeking an enlargement of time, the general position is that the applicant is expected to show good reason for the delay as well as substance in the intended appeal.

The Privy Council has said:

The rules of Court must, prima facie be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion.

If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. See **Ratnam v Cumarasamy and Another** [1964] 2 All ER, 933,935.

This Court has stated that where it is being moved to exercise its discretion in favour of an applicant in order to enable him to file notice and grounds of appeal out of time, it must be shown that:

(i) at all material times there was a serious continuing intention to prosecute the appeal;
(ii) there is merit in the appeal; and
(iii) the delay in moving the Court is understandable and excusable."

[33] Panton JA also addressed the position in relation to this area of the law as stated in the English Court of Appeal, which he said was similar to ours, and endorsed the words of Griffiths LJ in **C M Van Stillevoldt BV v El Carriers** [1983] 1 All ER 699 at 703, where Griffiths LJ gave approval to the relevant matters for consideration in the exercise of the court's discretion in deciding whether to extend time. These were:

"(1) length of the delay;

(2) reasons for the delay;

(3) whether there was an arguable case on the appeal; and

(4) the degree of prejudice to the defendant if time was extended."

[34] Panton JA added, giving approval to the dictum of Ackner LJ, with which Goff and Browne-Wilkinson, LJJ agreed, in **Palata Investments Ltd and Others v Burt and Sinfield Ltd and Others** [1985] 2 All ER 517, that when considering an application for an extension of time for appealing beyond the time limit specified, the discretion of the Court of Appeal is unfettered and will be exercised flexibly with regard to the particular facts of each case. Additionally, he emphasized, in endorsing the dictum of Lord Donaldson MR in **Norwich and Peterborough Building Society v Steed** [1991] 2 All ER 880 at 885-g, that:

> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant."

[35] Panton JA also reminded that in **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, the English Court of Appeal had recognised that the most important consideration in matters of that nature was the "overriding objective that justice be done" and indicated that the court had rejected the notion that "the absence of a good reason for the delay is always and in itself sufficient to justify the Court in refusing to exercise its discretion".

[36] It was therefore on the basis of having canvassed the principles distilled from the above cases (which all concerned applications for extension of time to appeal) that he summarised the relevant legal position in the oft cited statement made by him in this case. Indeed in **JPS v Rose Marie Samuels**, which also dealt with an application for an extension of time to file an appeal, Morrison JA on behalf of the court referred to **Leymon Strachan v The Gleaner** commenting that all the modern authorities on the subject were "conveniently gathered" in that case. He referred to Panton JA"s summary of the legal position, which, in addition to setting out the criteria mentioned above at para [33], was stated as follows:

> "(1) Rules of Court providing a timetable for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
>
> (3) …
>
> (4) Notwithstanding the absence of a good reason for delay the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[37] The court found in **JPS v Rose Marie Samuels** that the delay was not inordinate, and the reason expressed by counsel that she was unaware that the summary judgment was an interlocutory order and therefore had to be filed within 14 days of the order granting permission to appeal, as against 42 days from the grant of a final order, was an error which fell on the shoulders of counsel and not the litigant, who therefore ought to get the benefit of the exercise of the discretion in its favour.

[38] In **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and Another** [2014] JMCA App 7, the court dealt with two applications, firstly to dismiss the appeal for want of prosecution, and secondly to extend the time to file skeleton arguments and the record of appeal. Morrison JA on behalf of the court, referred to the principles set out in **Leymon Strachan v the Gleaner** without making any distinction with regard to the type of application which was before the court, while endorsing the dictum of Smith JA in **Haddad v Silvera**. In my view, this case must be considered on its own peculiar facts as the court was impelled to comment on the recalcitrant behavior of the appellants, and also their inconsistent conduct, namely in participating fully in proceedings in the court below while attempting to pursue an appeal which was challenging the constitutionality of the said proceedings. The court therefore in applying the principles set out in **Leymon Strachan v The Gleaner** said that the delay in the prosecution of the appeal had been "by any measure inordinate", and that no real reason had been put forward by the appellants to explain the delay. The court also considered and was of the view that the merit of the appeal was not strong, and accepted that the fact that the appeal was pending, could cause prejudice not only for the respondents but in respect of the law as the appellants' claim was that pursuant to certain provisions of the Independent Commission of Investigations Act, their constitutional rights against self-incrimination and to silence had been infringed. The application to extend time was therefore refused and the appeal was struck out for want of prosecution.

[39] The case of **Haddad v Silvera** is important in respect of the deliberations in this matter. In that case, the court dealt with an application to vary and or discharge the refusal of the single judge to extend the time for the filing of skeleton arguments. The court's focus was on the issue of delay. It took the view in keeping with the dictum of Lord Edmund Davies in **Revici v Prentice Hall Inc** [1969] 1 All ER 772 that:

> " … 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 …"

The court also recognised that the overriding objective principle was applicable to the exercise of its discretion when considering the delay but that there must be material on which the court could exercise its discretion. Additionally, the court stated that the absence of a good explanation for the delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but Smith JA made it clear that some reason must be proffered.

[40] In **Haddad v Silvera** it was the complaint of counsel for the applicant in the Court of Appeal, that the single judge of appeal in refusing the application had failed to consider the merits of the appeal or the question of any prejudice to the respondent, but the court commented that there had been no evidence of merit or prejudice whatsoever placed before the court for its consideration. The court in dismissing the application to vary the single judge's order, found that there had been delay in filing the skeleton arguments without a good explanation, and concluded that the applicant

had not shown that the single judge had wrongly exercised his discretion, and it would therefore not discharge or vary his order. The court stated further that there had also been delay by the applicant in making the application to set aside the decision of the single judge of appeal, without any reason having been proffered at all, which the court viewed as fatal to the application.

[41] On a detailed review of the basis for the decision, it is clear that the court was not laying down a rule that on any such procedural application, it is a necessary ingredient for the applicant to provide evidence that the appeal is likely to succeed based on merit.

[42] In fact, in my view, I must indicate that I find favour with the views expressed in the dicta of McIntosh JA and Mangatal JA (Ag) in **Vendryes v Keane and Keane** [2010] JMCA App 12 and **Quant v the Minister of National Security and The Attorney General of Jamaica** [2014] JMCA App 23, respectively, with regard to the approach to be taken to these particular types of applications. The former case concerned applications to strike out an appeal and for an extension of time to file skeleton arguments, chronology and record of appeal, whereas the latter involved an application for extension of time to file and serve skeleton arguments.

[43] McIntosh JA considering several authorities, extracted therefrom the principles concerning the factors to be taken into account when the court is exercising its discretion to grant or refuse applications for extension of time, when there has been a failure to comply with time periods set in the rules. She referred to **Leymon Strachan**

v The Gleaner, **Haddad v Silvera, Hashtroodi v Hancock** [2004] 3 All ER (d) 530, **United Arab Emirates v Abdelghafa**r [1995] 1 CR 65, **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934 and **Finnegan v Parkside Health Authority** [1998] 1 All ER 595. I hope I will do no injustice to her analysis by summarizing the principles thus:

(i) Each case must be decided on its own peculiar facts; there are no "hard and fast theoretical circumstances which will trigger the court's discretion to grant or refuse the application.

(ii) It is for the court to decide, considering always how best to deal with the case justly, and having regard to all the circumstances, whether the reason/explanation proffered is sufficient.

(iii) There is no specific period of delay, to be taken from the cases, which will be applicable for the exercise of the discretion in a party's favour, but the length of delay will always be a factor to be considered in the application, in the court's aim of dealing fairly with the parties, avoiding prejudice, saving expenses and ensuring that the cases are dealt with expeditiously.

(iv) The court is not confined to considering the relative positions of the parties.

(v) While the likelihood of the success of the appeal is a factor, there is no requirement for the applicant to file an affidavit of merit.

[44] Mangatal JA (Ag) took the view agreeing specifically with paragraph 29(3) in **United Arab Emirates** that "whilst the merits of the appeal are relevant, this court ought not, on an application for extension of time in relation to procedural default, to

investigate in detail the strength of the appeal. This is because one wants to avoid the danger of the application being turned into a "mini-hearing of the substantive appeal".

[45] It seems clear to me that the cases do make a distinction, as I stated earlier, in emphasis in relation to the prospects of success on appeal, between the cases dealing with extension of time to access the court and those dealing with procedural applications once the appeal is being processed through the court. In the former, greater emphasis is placed on the merit and success of the appeal whilst in the latter the focus is on the length of the delay, the explanation for the delay and the prejudice to the other party.

[46] I turn therefore to the facts of the instant case. The period of five and a half months as already indicated represents the delay in the filing of the skeleton arguments. I would not consider that delay insubstantial but it is not inordinate in the circumstances. Also, waiting on the reasons for judgment of the master as an explanation for the delay is, in my view, not a good reason, but a reason nonetheless. Having been at the hearing of the judgment summons, and having filed the notice and grounds of appeal, no doubt the skeleton arguments could have been drafted and filed, but having the Master's reasons to hand would always be helpful and instructive in the preparation of the arguments on appeal. There was no real prejudice claimed by the Ranglins and Nipo Line companies as their position seemed to be one focused on intending to challenge the settlement agreement itself at this late stage, as against putting forward any prejudice being suffered in challenging the appeal based on the judgment debtor summons being the improper procedure.

[47] With regard to the question of the merit of the appeal, counsel for the Ranglins and Nipo Line companies made lengthy submissions stating that since there had been a settlement agreement arrived at between the parties, Mr Henry was obliged to file a fresh suit in order to enforce the agreement, as there was no order of the court which could be enforced, and the judgment debtor summons was therefore inappropriate in the circumstances. Counsel for Mr Henry did not pursue any real discussion on the merits of the appeal, save to rely on the judgment of Rattray J, that the judgment debtor summons was the correct approach for the enforcement of an agreement which had been endorsed on counsel's brief. I hesitate, based on the position I have taken which is set out in paragraphs [32] to [45] herein, to deal with that aspect of the case, at this stage of the proceedings, without full argument from both parties, save to say that it appears that the appeal may not be unarguable but seems not to be strong.

[48] In the light of all of the above, bearing in mind that the notice of appeal was filed in time, so no order had to be made in relation thereto, I would however grant the application for an extension of time to file the skeleton arguments within seven days of this order and that the record of appeal be filed within 28 days of this order. I would also order that the costs of the application to extend the time for filing the skeleton arguments be the Ranglins and Nipo Line companies to be paid by Mr Henry to be taxed if not agreed. As a corollary, to that, I would dismiss the application to strike out the appeal with costs to Mr Henry also to be taxed if not agreed.

MCINTOSH JA

[49] I have had the opportunity to read in draft the judgment of my sister Phillips JA and found it to contain all that I would wish to say in this matter. There is therefore nothing for me to add except to say that I agree with her reasoning and all her conclusions.

MANGATAL JA (AG)

[50] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. Application for extension of time to file the skeleton arguments within seven days of this order granted.
2. Record of appeal to be filed within 28 days of this order.
3. Costs of the application for extension of time to file the skeleton arguments to the Ranglins and Nipo Line companies to be taxed if not agreed.
4. Application to strike out the appeal is dismissed.
5. Costs of the application to strike out appeal to Mr Henry to be taxed if not agreed.