JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 27/2013

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**GREGORY DUNCAN**	**APPLICANT**
AND	**ORVILLE PALMER**	**1ST RESPONDENT**
AND	**LORINDA PALMER**	**2ND RESPONDENT**

Mrs Yualande Christopher-Walker instructed by Thomas & Christopher Law Partners for the applicant

Craig Carter instructed by A McBean and Company for the respondents

5 April and 10 May 2019

BROOKS JA

[1] On 5 April 2019, after this court considered the very helpful submissions of counsel for the parties, it made the following orders:

> "1. The application for extension of time in which to file notice and grounds of appeal against the decision of Stamp J made on 24 March 2015 is refused.
>
> 2. Costs to the respondents to be agreed or taxed."

At that time, the court promised to put its reasons in writing. We now fulfil that promise.

Introduction

[2] This is an application by Mr Gregory Duncan for an extension of time in which to file notice and grounds of appeal against the decision of Stamp J (Ag) (as he then was), handed down on 24 March 2015. At the time, Stamp J (Ag) refused Mr Duncan's application to set aside a judgment that had been entered in favour of Mr Orville Palmer and his wife, Mrs Lorinda Palmer. Stamp J (Ag) granted Mr Duncan leave to appeal.

[3] Mr Duncan should have filed his notice and grounds of appeal on or before 7 April 2015 (rule 1.11(1)(b) of the Court of Appeal Rules (CAR)). He did not do so and was therefore obliged to apply for an extension of the time in which to comply with the rule. Over two years passed before he filed the present application, which was filed on 20 July 2017. He did, in the interim, file other applications in the Supreme Court. These will be mentioned below.

The background to this application

[4] Mr Duncan is a land developer. One of his projects was the building of townhouses at a property at Sandhurst Place in the parish of Saint Andrew. Adjoining that property was number 5 Sandhurst Crescent (Number 5), owned by Mr and Mrs Palmer. Mr Duncan conceived expanding his project into Number 5. He entered into an agreement to purchase Number 5 from the Palmers.

[5] Mr Duncan paid a deposit at the commencement of the agreement but did not pay the outstanding balance of the purchase price. He had, however, entered Number 5 and demolished portions of the building there. The entry was with permission, but the

Palmers contended that the demolition was not. The Palmers issued a notice for Mr Duncan to complete the purchase but he did not. They sued him in the Supreme Court for damages for breach of contract or, in the alternative, for specific performance.

[6] Mr Duncan filed a defence to the claim, in which he asserted that he was ready, willing and able to complete the contract. He also stated that the Palmers had consented to his entering Number 5 and removing the roof, windows and doors of the building.

[7] Mr Duncan changed attorneys-at-law at least twice after he was sued. On 14 January 2015, probably while he was between attorneys-at-law, he failed to attend a mediation hearing. The Palmers had, however, in November 2014, filed an application to dispense with mediation and for a date to be set for case management conference, or alternatively, for Mr Duncan's statement of case to be struck out and for judgment to be entered on the claim. The application went before Graham-Allen J (Ag) (as she then was) on 20 January 2015. She not only granted the orders sought but awarded the Palmers damages of $20,833,739.00. Mr Duncan was not present or represented at the hearing.

[8] Mr Duncan’s application to set aside the orders made by Graham-Allen J (Ag) went before Stamp J (Ag) for the first time on 23 February 2015. In his affidavit in support of the application, Mr Duncan explained that he was not aware of the application that went before Graham-Allen J (Ag). He stated that although his former attorneys-at-law had been served with the notice of the application for court orders,

and later the resultant judgment, the notice of the application had not been brought to his attention.

[9] Despite refusing to set aside the judgment, Stamp J (Ag) set aside the award of damages. He ordered that the damages due to the Palmers be assessed. For various reasons the assessment did not commence until 26 February 2019; nearly four years later.

The applicable principles

[10] Rule 1.7(2)(b) of the CAR empowers this court to "extend or shorten the time for compliance with any rule...even if the application for an extension is made after the time for compliance has passed". Thus, it is within the general power of the court to consider Mr Duncan's application.

[11] Mr Duncan is required to satisfy the well-established criteria for applications of this nature. The criteria were set out in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. The relevant portion of the judgment in that case has been often repeated in cases dealing with such applications. Panton JA (as he then was) stated the criteria at page 20 of that judgment. He said:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table 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) In exercising its discretion, the Court will 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.

(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."

These criteria have been accepted as still being relevant to the CAR. Authority for the applicability may be found in **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23.

[12] Mr Duncan's application will be assessed against those criteria.

The analysis

a. The length of the delay

[13] Mr Duncan's delay has two segments. The first segment is between 24 March 2015 (the date of Stamp J (Ag)'s decision) and 20 July 2017 (the date when this application for extension was filed). This delay is undoubtedly inordinate.

[14] The second delay is between 5 March 2018, when this application was adjourned on the request of the parties, and 18 February 2019, when Mr Duncan requested that it be relisted. The delay in this segment is also inordinate.

[15] Although delay, by itself is not determinative of the application, it is not an insignificant element in the assessment of the application (see **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6). In that case, K Harrison JA pointed out, in paragraph [25] of that judgment, that the "time requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed".

[16] The delay in this application must be held against Mr Duncan in this assessment.

b. The reasons for the delay

[17] In his affidavit in support of this application, Mr Duncan deposed to the reason for the delay in the first segment. He said that during that time, on the advice of his then attorneys-at-law, he was busily pursuing a further application in the Supreme Court to set aside the default judgment, which Stamp J (Ag) had refused to set aside. It is unnecessary to detail the progress of that application, but it was only after 3 May 2017, when Master Mason ruled that no judge of the Supreme Court could set aside the default judgment, and that only an appeal could achieve that result, that he filed the present application. According to Mr Duncan, he was relying on legal advice and was not personally at fault for this segment of the delay.

[18] Mr Duncan has not provided any explanation for the delay in the second segment. The application was adjourned as the parties wished time to discuss settlement. Although he was represented by counsel at that time, he apparently had

disagreements with his attorneys-at-law, as his letter requesting a relisting of the application suggests that he would be trying to secure legal representation.

[19] As regards the first delay, Mrs Christopher-Walker submitted that, although the legal strategy adopted by Mr Duncan's former counsel to have the judgment against him set aside may have been flawed, Mr Duncan did all that was required of him to be done. She argued therefore that he ought not to suffer for the mistakes of his former attorneys-at-law. She relied on **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 in support of that submission.

[20] Counsel for the Palmers, Mr Carter, submitted that the reason advanced by Mr Duncan, in his affidavit, of complying with the legal advice of his former counsel for the delay is insufficient. He relied on **Garbage Disposal and Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2 to ground his submission. Learned counsel pointed out that although Mr Duncan sought to rely on that incorrect procedure, the flawed application was not filed until 11 May 2016, that is, almost 14 months after Stamp J made his ruling.

[21] In analysing this issue, it is noted that, unlike in **Garbage Disposal and Sanitations Systems Ltd v Noel Green and others**, there has been no affidavit filed by Mr Duncan's former attorneys-at-law concerning this issue of the delay in filing the notice and grounds of appeal. **Salter Rex & Co v Ghosh** allows the court to take into account that failures to comply with rules were made by the attorney-at-law and should not be used to penalise the litigant. In that case, Lord Denning MR made the

statement which many a defaulting litigant has since espoused: "We never like a litigant to suffer by the mistake of his lawyers". Unlike the present case, it is also apparent, from the judgment of Lord Denning MR, that Dr Ghosh's attorneys-at-law also deposed in the application before the court.

[22] It is also noted that, even if such an affidavit were filed and the mistakes accepted by Mr Duncan's counsel, it may not have constituted a proper reason for delay in filing the second application to set aside the judgment. As Lord Dyson, writing on behalf of the Board of the Privy Council, in **Attorney General v Universal Projects Ltd** [2011] UKPC 37, at paragraph [23] of the judgment, opined:

> "...To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation. **Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.** Similarly if the explanation for the breach is administrative inefficiency." (Emphasis supplied)

[23] Mr Duncan's explanation does not amount to a good explanation for the delay. At best it implies an inexcusable error. Stamp J (Ag), having refused to set aside the judgment entered against Mr Duncan, granted him leave to appeal his decision in that respect, thereby making it absolutely clear what should have been Mr Duncan's next step in the proceedings. Mr Duncan's explanation is, therefore, not acceptable.

[24] Although Mr Duncan did not provide a good reason for his failure to comply with the rules, that by itself, is not fatal to his application (see **Leymon Strachan v The Gleaner Co Ltd** and **Finnegan v Parkside Health Authority** [I998] 1 All ER 595). It

has however tipped the scale against his application. As Smith JA opined, at page 13, in **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 31/2003, Motion No 1/2007, judgment delivered 31 July 2007:

> "...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**..." (Emphasis supplied)

[25] In respect of the second delay, no submissions were made on this issue. However, for the reasons set out in the above extract from **Peter Haddad v Donald Silvera**, it is found that the inordinate delay and the lack of explanation therefor contribute to Mr Duncan's application being untenable in this regard.

c. Whether there is an arguable appeal

[26] Stamp J (Ag)'s refusal to set aside the judgment entered against Mr Duncan is an exercise of the discretion vested in the learned judge. This court has often indicated that it will not lightly disturb the exercise of a discretion by a judge unless it can be demonstrated the judge was patently wrongly in the exercise of his or her discretion (see **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[27] It was therefore incumbent on Mr Duncan to satisfy this court that Stamp J had acted erroneously in the exercise of his discretion. To do this, he was required to provide the court with sufficient material to enable it to make a proper assessment in the determination of the merits of the appeal. In that context, it is noteworthy that he did not file any proposed grounds of appeal.

[28] As counsel, Mr Carter, rightly submitted, the court is not properly equipped, in the absence of proposed grounds of appeal, to assess whether or not there is an arguable appeal. However, the following complaints could be discerned from the submissions made by Mrs Christopher-Walker:

i. Stamp J (Ag) erred when he failed to recognise that the evidence required under rule 74.14(7) of the Civil Procedure Rules (CPR) had not been satisfied to ground striking out of Mr Duncan's case and entering judgment against him pursuant to rule 74.14(6).

ii. Stamp J (Ag) fell into error when he failed to examine the requirements pursuant to rule 26.8 of the CPR.

[29] It should be noted that rule 26.8 of the CPR would not have been applicable to the matter that was before Stamp J (Ag). The applicable rule would have been rule 74.15 of the CPR. Both rules are, however, almost identical in their terms as they concern the relief from sanctions for the failure to comply with any rule, order or direction. Rule 74.15 entitles the court to grant relief from sanction if it were satisfied that there was a good explanation for the failure to comply with any rule, order or direction under Part 74, which deals with mediation.

[30] It is also to be noted that it was within Stamp J (Ag)'s discretion to find that no sufficient reason was provided for Mr Duncan's failure to attend mediation. There was evidence to show that Mr Duncan's then attorneys-at-law had notice of the date, time

and place of the mediation and he failed to attend. As such, the Palmers were entitled to apply to have his defence struck out and judgment entered against him. Similarly, it was within the discretion of Graham-Allen J (Ag) to have granted that application.

[31] Stamp J (Ag), therefore, could not be faulted for having refused Mr Duncan's application to set aside the judgment entered in favour of the Palmers by Graham-Allen J (Ag). There is no arguable ground of appeal.

d. The degree of prejudice to the other party

[32] Although Mrs Christopher-Walker submitted that the degree of prejudice to the Palmers was not significant because they were at all times aware that he wished to contest their claim, that submission does not address the significant prejudice to them. They have stated that not only has Number 5 been made uninhabitable and incapable of earning an income, but they have a continuing obligation to rent other premises and to service the mortgage loan for which Number 5 is the security. It is also important to note that the hearing for the assessment of damages has been completed and the parties are awaiting the decision of the judge who conducted that hearing. To set aside the judgment in their favour would be severe prejudice to the Palmers.

e. The decision that justice requires

[33] The principle of dealing with the case justly compels the conclusion that this application ought to be rejected. The Palmers have suffered loss which was undoubtedly caused by Mr Duncan. They continue to suffer loss whilst they await the

conclusion of the assessment of damages. To set aside the judgment in order to allow for a trial in years to come would not be in the interests of justice.

Conclusion

[34] Mr Duncan has failed to satisfy the criteria which have been established for granting an extension of time in which to file notice and grounds of appeal. The reasons are as follows:

a. his delay in filing this application was unduly long;

b. his reason for the delay is unacceptable;

c. he has not shown that he has an arguable appeal; and

d. the prejudice to the Palmers would render it unjust to set aside the judgment.

It is for those reasons that I agreed to the orders stated at paragraph [1] herein.

FOSTER-PUSEY JA

[35] I have read the draft judgment of Brooks JA. His reasons for judgment are in accord with mine. I have nothing to add.

FRASER JA (AG)

[36] I too have read, in draft, the judgment of my brother Brooks JA. His reasons for judgment accord with mine. I have nothing to add.