

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 270/2018

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA**

BETWEEN	NORBUILD LIMITED	APPLICANT
AND	CHARLES MAXWELL	1ST RESPONDENT
AND	JODIE ANN BARBER	2ND RESPONDENT
AND	VICTORIA MUTUAL BUILDING SOCIETY	3RD RESPONDENT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	4TH RESPONDENT

Miss Charmaine Bowen in person representing the applicant

Mrs Daniella Gentles-Silvera and Miss Kathryn Williams instructed by Livingston, Alexander & Levy for the 3rd respondent

Jerome Spencer and Miss Kimberley Diedrick instructed by Patterson Mair Hamilton for the 4th respondent

13, 14 and 17 May 2019

PHILLIPS JA

[1] The applicant (Norbuild Limited) is seeking permission to appeal the decision of Laing J delivered on 29 November 2018, wherein he made the following orders:

- "1. The court in exercising its case management powers orders that the Ancillary Claim in 2018CD00082 herein

is stayed until the final determination of Claim No. 2015HCV01263 and Claim No. 2017HCV01419.

2. The [applicant's] application for leave to appeal is refused.
3. Costs to be costs in the claim."

[2] Miss Charmaine Bowen, the applicant's managing director, indicated that Norbuild was seeking leave to appeal that decision on three main bases. The first, was that the 4th respondent, National Commercial Bank Jamaica Limited (NCB), should not have been allowed to proceed on its application, filed on 7 November 2018, disputing the court's jurisdiction pursuant to rule 9.6 of the Civil Procedure Rules 2002 (CPR), since NCB had not served an acknowledgement of service on Norbuild and the acknowledgement of service form did not bear her signature. In fact, she pointed out that the signature on the acknowledgement of service placed before the court, was that of counsel for the firm Nigel Jones & Company, who represented the 1st and 2nd respondents, and there was also indication that it had been received by Livingston Alexander & Levy, attorneys for the 3rd respondent. She submitted that counsel had attempted to deceive the court into believing that Norbuild had signed the acknowledgement of service form filed by NCB, and in so doing had accepted service of the same.

[3] Norbuild's second basis for seeking permission to appeal was that it had not been served with NCB's notice of application disputing the court's jurisdiction, the affidavit in support and other supporting documents. She contended that Norbuild was

therefore unable to respond to the NCB's application, and Laing J erred in staying the claim.

[4] The third basis upon which Norbuild urged this court to grant permission to appeal was that it had filed an application for judgment in default since NCB had failed to file and serve an acknowledgment of service, defence, or affidavit in response to its further amended ancillary claim filed 25 September 2018. Laing J therefore erred in staying the matter without considering Norbuild's request for a default judgment.

[5] Counsel for NCB, Mr Jerome Spencer, observed that it had never been NCB's contention that a hard copy of the acknowledgment of service had been served on Norbuild. He pointed to an affidavit of alternative service of Kimberley Diedrick, attorney-at-law also representing NCB filed 25 October 2018, which attached email correspondence between Miss Diedrick and Mr Oraine Nelson, who was then counsel on record for Norbuild. In an email dated 12 October 2018, Miss Diedrick informed Mr Nelson that:

"For the purpose of effecting service on you (after our attempts to do so personally at your office on October 9, 2018), please see attached the Acknowledgment of Service filed on October 9, 2019."

Mr Nelson responded to Miss Diedrick via email, that same day, stating that "[s]ervice of Acknowledgment of Service on behalf of NCB confirmed".

[6] Mr Spencer indicated that Mr Nelson was counsel on record when the further amended ancillary claim was filed on 25 September 2018. He also pointed to the fact

that Mr Lemar Neale was instructed by Mr Nelson in the application heard by Edwards J (as she then was) on 27 September 2018. Mr Spencer also showed the court a notice of change of attorney dated 29 October 2018, which was served on the 3rd respondent, Victoria Mutual Building Society (VMBS), on 1 November 2018. In reliance on these documents, Mr Spencer argued that the notice of change of attorney was issued after Mr Nelson, counsel on record for Norbuild at that time, had accepted service. Counsel for VMBS, Mrs Daniella Gentles-Silvera, reminded the court that rule 6.2 of the CPR permits service of documents other than the claim form by means of electronic communication, and so it was permissible for Mr Nelson to have received the acknowledgment of service through that method. Consequently, Norbuild was served with the acknowledgement of service in compliance with rule 9.6 of the CPR.

[7] Mr Spencer disputed Miss Bowen's argument that Norbuild was unaware of the application pursuant to rule 9.6 of the CPR. He pointed the court to affidavits filed 18 and 22 November 2018, which Norbuild filed in response to that application. Counsel also drew the court's attention to specific paragraphs in those affidavits where Miss Bowen referenced the said application and urged the court to dismiss it.

[8] Mr Spencer also argued that although Norbuild had sought a request for default judgment, that request could only have been granted if no acknowledgment of service or defence had been filed. The acknowledgement of service, he indicated, had indeed been filed and served on Norbuild. Counsel reminded the court that pursuant to rule 9.6(8) of the CPR, the time to file the defence does not run until NCB's application to dispute the court's jurisdiction had been considered and refused, and so a default

judgment could not have been entered on 29 November 2018, the application having not yet been determined. Counsel also reminded the court that under rule 9.6(6)(d), Laing J was empowered to stay proceedings when an application is made under rule 9.6 and so he had not erred in that regard.

[9] In all these circumstances, we agree with the submissions made by counsel for NCB and VMBS. The documentary evidence supports their contention that Norbuild was indeed served with the acknowledgment of service as the notice of change of attorney was filed and served after Mr Nelson, who was counsel on record for Norbuild, had already accepted service on its behalf. When we examined the two affidavits filed by Norbuild in response to NCB's application under rule 9.6 of the CPR, we find it unfortunate that Miss Bowen put forward to the court that she was unaware of the application, as she responded to it in the two affidavits she had filed. Indeed, those affidavits are labelled as being in response to NCB's application to dispute jurisdiction, and were replete with challenges to NCB's claim. This flies in the face of Miss Bowen's argument before this court that she was ignorant of the application she had to meet before Laing J. Rule 9.6(8) does indeed extend the time within which one has to file a defence once an application is made under rule 9.6, and rule 9.6(6)(d) does empower a judge to grant a stay of those proceedings. Accordingly, in our view, Norbuild's proposed grounds of appeal lack any real chance of success, and so its application for permission to appeal must fail.

[10] We therefore make the following orders:

1. Application for permission to appeal is refused.
2. Costs to the 3rd and 4th respondents to be taxed if not agreed.