[2016] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 68/2014

APPLICATION NO 154/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**RBC ROYAL BANK (JAMAICA) LIMITED**	**1ST APPLICANT**
AND	**RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED**	**2ND APPLICANT**
AND	**ROYAL BANK OF CANADA**	**3RD APPLICANT**
AND	**SAMUEL BILLARD**	**4TH APPLICANT**
AND	**RAYMOND CHANG**	**5TH APPLICANT**
AND	**GREG SMITH**	**6TH APPLICANT**
AND	**OCEAN CHIMO LIMITED**	**RESPONDENT**

Emile Leiba and Jonathan Morgan instructed by DunnCox for the applicants

Roderick Gordon and Ms Kereene Smith instructed by Gordon McGrath for the respondent

27 June and 15 July 2016

BROOKS JA

[1] The resolution of this application turns on whether time runs during the long legal vacation for the purposes of filing and serving a notice of appeal. If time does not

run, the applicants would not have been out of time in the service of the written submissions as required by the Court of Appeal Rules 2002 (CAR), as they existed in August 2014, before being amended. If it is that time did run for those purposes, the applicants ought to have served the submissions at the same time that they served the notice of appeal. Their failure to do so would mean that they are obliged to apply for an extension of time within which to do so and be subject to the rigours of such an application.

[2] An ancillary point concerns the place that some procedural appeals hold under the rules of this court.

The order in the court below

[3] RBC Royal Bank (Jamaica) Limited, RBC Royal Bank (Trinidad and Tobago) Limited, Samuel Billard, Raymond Chang and Greg Smith are the applicants mentioned above. They are defendants to a claim filed by Ocean Chimo Limited (Ocean Chimo) in the Commercial Division of the Supreme Court. Although, after the claim had been filed, two of the applicants placed Ocean Chimo into receivership, Ocean Chimo, nonetheless, pursued the claim. The applicants applied for a stay of proceedings pending Ocean Chimo providing proof that it either had the consent of the receiver to pursue the claim, or that its directors had provided security for the costs of the claim. The applicants also sought an order that in the absence of such proof, the claim be struck out. C Edwards J refused the applications. She however granted permission to appeal from her order. That order was made on 31 July 2014, the last day of the court's term, before the commencement of the long legal vacation.

The procedure adopted by the applicants

[4] On 11 August 2014, the applicants filed their joint notice and grounds of appeal, along with their written submissions in support of their appeal. As it turns out, assuming that time did run during the long vacation, that filing would have been within the time required by the CAR whether the requirement for filing were seven days, as for a procedural appeal, or 14 days, as for an interlocutory appeal. That is because, for a procedural appeal, neither weekends nor the two public holidays, falling during that time, were to have been counted. The last day for filing for a procedural appeal would, therefore, have been 12 August 2014, while for an interlocutory appeal, the last day for filing would have been 14 August 2014.

[5] The applicants' attorneys-at-law, however, made an error. Whilst they did serve the notice of appeal on the same day that they filed it, they only served the first page of the written submissions along with the notice of appeal. On 28 August 2014, Ocean Chimo's attorneys-at-law pointed out the fact of the defective service. The applicants' attorneys-at-law corrected the defect on the following day. Based on advice from the registry of this court, they, on 10 September 2014, filed an application for time to be extended for the filing of the notice of appeal and the submissions in support. That application has been relisted, and is the application which is presently before the court. Ocean Chimo has sought to resist the application.

The submissions on behalf of the applicants

[6] Mr Leiba, on behalf of the applicants, argued along two broad bases in support of the application. Firstly, he submitted that the registry was incorrect in requiring an

application for extension of time. Secondly, and alternatively, he argued that if the court were not in agreement with his first submission, this was a good case for it to exercise its discretion and extend the time.

[7] In respect of his first line of approach, Mr Leiba submitted that since Edwards J's order was made on the last day of the legal term, and that time for filing and serving the notice of appeal did not run during the legal vacation, the filing, and the corrected service of the notice and grounds of appeal and the submissions in support thereof, were not out of time. On his submissions, time would only begin to run again, at the beginning of the new term on 16 September 2014, by which time the filing and corrected service had already been effected. On that basis, therefore, no application to extend time was needed. He relied on, in support of his submissions, the judgment in **Michael Stern v Richard Edward Azan and Haskell Thompson** Application No 122/2008 (delivered 19 September 2008).

[8] His alternative submission was that if time did run during the legal vacation then the short time for the continuation of the default, the excusable reason for the default, the likelihood of success of the appeal and the absence of any real prejudice to Ocean Chimo, made this a good case for the court to exercise its discretion and grant the extension sought in the application. He cited, among others **Shurendy Adelson Quant v The Minister of National Security and the Attorney General of Jamaica** [2014] JMCA App 23, in support of his submissions on this point.

The submissions on behalf of Ocean Chimo

[9] Mr Gordon countered Mr Leiba on both limbs of the latter's major submissions. Firstly, Mr Gordon argued that, as this was a procedural appeal for the purposes of rule 2.4 of the CAR, the submissions ought to have been filed and served with the notice of appeal within the time specified by the CAR. The applicants had failed to observe that time limit and were, therefore, in default of the rule, and needed to apply for an extension of time. The legal vacation, learned counsel submitted, did not assist the applicants as this was not a situation in which time did not run during the legal vacation.

[10] It seemed, at one stage, that Mr Gordon had posited that if a party opted to file its appeal during the long vacation, it was required to comply with the rules. Having failed to serve the submissions with the notice of appeal, the applicants were in fact in breach of rule 2.4(1). They, therefore, needed an order of the court to rectify their situation.

[11] In respect of the application for extension of time, Mr Gordon submitted that in such applications, the reason proffered for the delay is of paramount importance. He argued that the authorities established that where no excuse is given, no indulgence ought to be granted. In this case, learned counsel submitted, no sufficient reason had been tendered and thus the application had failed that critical test. He further argued that the applicants' appeal was unmeritorious and that the delay had prejudiced Ocean Chimo and caused it to incur additional expense. Learned counsel relied on a number of

cases including **Peter Haddad v Donald Silvera** SCCA No 31/2003 (delivered 31 July 2007), **Elita Flickenger v David Preble and Another** [2013] JMCA App 13, **David Wong Ken v National Investment Bank of Jamaica Limited and Others** [2013] JMCA App 14 and **Attorney General v Universal Projects Ltd** [2011] UKPC 37.

The issue of whether the applicants served within the stipulated time

[12] On the question of whether or not this was a procedural appeal, Mr Leiba argued that this was not a procedural appeal for the purposes of rule 1.11(1) of the CAR, which stipulates the time for filing the notice of appeal. He agreed, however, that it was a procedural appeal for the purposes of rule 2.4 of CAR, which stipulates the time for filing and serving written submissions in respect of the appeal. Mr Gordon, after some initial resistance, accepted the position taken by Mr Leiba in respect of these rules.

[13] It may be said, then, that the parties eventually agreed that the applicants were allowed 14 days for the filing and service of their notice of appeal, as is required by rule 1.11(1)(b) of the CAR but that they were obliged to file and serve their written submissions with the notice of appeal, as is required by rule 2.4(1) of the CAR.

[14] In analysing this aspect of the application, it should be noted that this is not a case where the failure to serve the submissions invalidated the appeal. The appeal remained valid regardless of any irregularity of the service (see **Hoip Gregory v Vincent Armstrong** [2012] JMCA App 21). The issue that is to be resolved at this stage, concerns the service, and in particular whether or not the service was within the time stipulated by the CAR.

[15] The term "procedural appeal" is defined in 1.1(8) of the CAR as meaning "an appeal from a decision of the court below which does not directly decide the substantive issues in a claim". There are certain exceptions stipulated in the rule but none of those exceptions apply here.

[16] The time for filing and serving notices of appeal, including procedural appeals, is stipulated in rule 1.11 of the CAR. Prior to 10 September 2015, that rule stipulated as follows:

> "(1) The notice of appeal must be filed at the registry and 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.
>
> (2) The court below may extend the times set out in paragraph (1)." (Emphasis supplied)

[17] The time requirements for filing are not critical in this case. This is because the applicants filed the appeal within time on the standard set by both paragraphs (a) and paragraph (b) quoted above. A portion of paragraph (b), has been specifically highlighted as pointing the way to the resolution to this application. In order to determine whether permission is required in any particular instance, regard must be had to section 11(1) of the Judicature (Appellate Jurisdiction) Act. It states, in part that

permission to appeal is required in cases of interlocutory orders. The relevant part of section 11(1) states as follows:

> "No appeal shall lie–
> …
>
> (*f*) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except–
> ..."

None of the exceptions listed in the section is relevant to this appeal.

[18] As the order by Edwards J does not directly decide the substantive issues in the claim, it is undeniable that this appeal would fall within the meaning of a procedural appeal, as defined by rule 1.1(8) of the CAR. However, since the application, made before her, did not fall under an exception to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, an application for permission to appeal was required in this case. In these circumstances, it is rule 1.11(1)(b), and not rule 1.11(1)(a) of the CAR, that applies.

[19] The question that remains, however, is whether this appeal is, nonetheless, a procedural appeal for the purposes of rule 2.4 of the CAR. Rule 2.4(1) of the CAR, prior to 10 September 2015, required the appellant, in the case of a procedural appeal, to "file and serve written submissions in support of the appeal with the notice of appeal".

[20] Looking broadly at the rules regarding procedural appeals, it would seem that rule 2.4 would still continue to apply to this appeal. There is nothing in the rules that excludes such appeals from being considered under the provisions of rule 2.4. There is

no other provision, for example, similar to rule 1.11(1)(b) which draws a contrast or provides an alternative procedure to rule 2.4. Indeed, it seems that the framers of the rules specifically considered procedural appeals as meriting the speedier procedure, which is set out in rule 2.4.

[21] Although this court decided in **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9, that such appeals could not properly be heard by a single judge of the court, it did not find the procedure for procedural appeals as being unconstitutional or in breach of the provisions of the Judicature (Appellate Jurisdiction) Act. Indeed, the court endorsed its use but stipulated the manner in which it could be used so as to be in conformity with that Act.

[22] If rule 2.4 applies to this appeal, then it means that the applicants had failed to comply with rule 2.4(1). The intervention of the legal vacation cannot assist them. It is true, however, that in **Stern v Azan** K Harrison JA ruled that time does not run during the legal vacation for the purposes of the filing and serving of notices of appeal. The learning in that case, however, has been overtaken by subsequent events.

[23] In that case, the learned judge recognised that rule 1.1(10) of the CAR imported the provisions of rule 3.5(1) of the CPR into the CAR for the purposes of considering the service of documents during the long vacation. Rule 3.5 of the CPR, based on an amendment made in 2006, stipulated that, for the purpose of filing and serving statements of case, time did not run during the long vacation. He then quoted rule 2.4 of the CPR which defined statements of case to mean:

> "(a) **a claim form**, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court..." (Emphasis supplied)

[24] The learned judge of appeal then concluded that a notice of appeal was the equivalent of a statement of case. On his reasoning, since rule 3.5(1) of the CPR stipulated that time did not run during the legal vacation for filing and serving statements of case, it necessarily followed that time did not run during the legal vacation for filing and serving notices of appeal. The learned judge said in arriving at his conclusion:

> "16. Since we are here dealing with the question of 'time', it is beyond dispute that Part 3 of the CPR comes into operation. Rule 3.5 deals specifically with the filing and serving of a statement of case during the vacation period but with the necessary modification I see no reason why the words 'notice of appeal' could not be substituted for the words 'statement of case'. In my judgment, there is considerable merit in the submissions made by Mr. Anderson on behalf of the Appellant/Respondent.
>
> 17. In the circumstances, I do agree with Mr. Anderson when he submitted that having regard to Rule 3.5 of the CPR, time would not run against the Appellant/Respondent during the legal vacation…."

[25] Although Harrison JA did not so state, it must be held that for these purposes a notice of appeal was the equivalent of a claim form. This inference may be drawn from the fact that both documents are originating documents for the purposes of the

proceedings before the respective courts. The point is important for interpreting rule 3.5 after it was amended on 16 November 2011.

[26] **Stern v Azan** case was, of course, decided before those amendments were made to the CPR. Among those amendments was one which affected the issue of the filing and serving of statements of case during the legal vacation. Rule 3.5(1) of the CPR was amended to exclude the filing and serving of a claim form from the operation of that rule. The rule was amended to read:

> "During the long vacation, the time prescribed for filing and serving any statement of case **other than the claim form**, or the particulars of claim contained in or served with the claim form, does not run." (Emphasis supplied)

[27] In applying the changed rule 3.5 of the CPR to the inference to be drawn that a notice of appeal is the equivalent of a claim form for these purposes, it necessarily follows that the long vacation does not prevent time from running for the purposes of filing and serving a notice of appeal. A notice of appeal would have been expressly excluded from the operation of that rule, as amended.

[28] The applicants in this case were therefore obliged to file and serve their written submissions with their notice of appeal, as required by rule 2.4(1) of the CAR. Having failed to serve the submissions at the time that they served the notice of appeal, they are obliged to apply for an extension of time in which to do so. They are obliged, in that case, to satisfy the requirements for such applications.

[29] Before turning to that issue, it should be noted for completeness that rule 2.4 of the CAR was amended in September 2015. The amendments, among other things, removed the requirement to file and serve the submissions along with the notice of a procedural appeal.

The application for extension of time

[30] The applicants' task, for this aspect of the application, is, however, not an onerous one. This was not a case of a long delay, inexcusable behaviour, wholly unmeritorious grounds or irreversible prejudice. The applicants had demonstrated every intention to comply with the rules. They filed the required documents within time and attempted to serve them timeously. Their attorneys-at-law, however, made a mistake. They failed to serve the entire document containing the submissions. As soon as they were made aware of the error, they corrected it. Similarly, shortly after the registry advised them that an application for extension of time was required, it was filed. Ocean Chimo was not misled by the situation. It knew that an appeal was in progress, but that it had hit a snag. The prejudice to it is not such that it cannot be cured by an award of costs.

[31] The contents of the last paragraph address the issues that are required to be addressed by the court in examining applications for extension of time in which to comply with the rules of procedure in this court. Those requirements were set out in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered on 6 December 1999). The relevant principles require the court to consider the length of the delay, the reason for the delay and the prospects of success

of the proposed appeal. Those factors are however to be considered in the overarching context of the prejudice to the other parties to the appeal and of the overriding objective of dealing with cases justly.

[32] This is one of those cases in which the words of Denning MR, as used in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, are most apposite. He said, at page 866: "We never like a litigant to suffer for the mistake of his lawyers". It will be clear from the above summary of the facts of the case that this is a case where an extension of time ought to be granted on the bases that all the requirements set out in **Leymon Strachan v The Gleaner Co** have been satisfied.

[33] It would have been noticed that no attempt was made to delve into the merits of whether a stay of proceedings ought to be granted, when a company in receivership proceeds with litigation, apparently without the consent of the receiver. The issue is not without complexity, and this case also can benefit from the reasoning in **Palata Investments Ltd and Others v Burt & Sinfield Ltd and Others** [1985] 2 All ER 517. In that case, it was accepted that where the delay involved is very short and there is an acceptable explanation for it, the court need not give any detailed consideration to the merits of the appeal. Ackner LJ stated, at page 521:

> "The whole of this matter, it seems to me, depends on whether or not we can properly look on the delay in this case as being an exceptional one. In my judgment I would so classify it. I have already referred to the shortness of the period involved: three days. I have already referred to the fact that the plaintiffs' solicitors knew that there was in all likelihood to be an appeal, so that there was no question of their proceeding on the false assumption that they had achieved finality for their client. I have referred to the fact

> that the solicitors asked specifically of counsel for a statement of the length of time for serving the notice and that he gave them a clear statement that it was six weeks.... There is no question of any prejudice arising to the plaintiffs in the circumstances which I have described, and in that situation there was in my judgment absolutely no need to go into the complex and time consuming question whether or not there was a good arguable case on the appeal. There is no invariable rule which requires that consideration and it would obviously involve the very reverse to what the new procedure is designed to achieve if on every application to extend time for leave to appeal there was a pre-appeal hearing in order to consider what were the prospects of success."

The circumstances described in that extract are very similar to the present case.

[34] It is true that the defective service has been explained by Mr Leiba as being as a result of an "inadvertent oversight", a term which has been only cautiously accepted as an excuse for non-compliance with the rules of procedure. Their Lordships in **The Attorney General v Universal Projects Ltd**, addressed the point. They said at paragraph [23] of that case:

> "...Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.

[35] In **City Printery Ltd v Gleaner Co Ltd** (1968) 10 JLR 506, this court examined the excuse of "inadvertence". Fox JA accepted that inadvertence may constitute a good reason for the exercise of the court's discretion to extend the time for compliance with a rule. He cautioned however that the exercise was dependent on the circumstances of each case. He said, at page 511:

> "An explanation of delay based on inadvertence and oversight in a legal adviser may be, however, a good reason for

> exercise of the court's discretion in favour of an appellant, depending on the facts of the particular case."

[36] Although the defective service in this case has not really been explained, other than by inadvertence, the failure by the attorneys-at-law to have immediately recognized the flaw cannot properly be termed "inexcusable oversight". The circumstances of the case would have allowed for the term "inadvertence" to be accepted as an adequate explanation, which justified the exercise of the court's discretion in favour of the applicants.

Summary and conclusion

[37] The analysis of this application demonstrates that some procedural appeals fall within the procedure prescribed by rule 2.4 of the CAR despite the fact that they fall under the purview of rule 1.11(1)(b) of the CAR, which deals with ordinary interlocutory appeals, instead of rule 1.11(1)(a), which specifically deals with procedural appeals. It also demonstrates that the long vacation does not prevent time from running for the purposes of filing notices of appeal.

[38] The present case is not one in which the applicants could claim the benefit of the long vacation as a basis for claiming that they had complied with the rule concerning service of the documents required for a procedural appeal. They were obliged, therefore, to apply for an extension of time for compliance with the rule.

[39] The circumstances of the case were such, however, that the application for extension of time ought to be granted. The applicants had signalled every intention of

complying with the rules, but were let down by an error in executing service of the relevant documents. They have satisfied all the requirements for securing the exercise of this court's discretion in their favour in extending the time in which to comply with rule 2.4(1) of the CAR.

[40] The application for extension of time should be granted. As a result, the service on 29 August 2014 should stand as proper service and Ocean Chimo should be granted 14 days from the date of this order (using the standard now set in rule 2.4) within which to file and serve its submissions and authorities in response to those of the applicants. Ocean Chimo should have its costs of this application.

SINCLAIR-HAYNES JA

[41] I have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[42] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The application for extension of time is granted.
2. The time for service of the appeal from the order of Edwards J made on 31 July 2014 is hereby extended to 29 August 2014 and

the notice of appeal and submissions in support thereof that were served on that date shall stand as properly served.

3. The respondent shall be at liberty to file and serve within 14 days of the date hereof, submissions in opposition to the appeal and copies of such authorities as it deems appropriate.

4. Costs of the application to the respondent, to be taxed if not agreed.