JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 29/2009

BEFORE: THE HON. MR JUSTICE HARRISON JA
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN	BARTHOLOMEW BROWN	1st APPELLANT
AND	BRIDGETTE BROWN	2nd APPELLANT
AND	JAMAICA NATIONAL BUILDING SOCIETY	RESPONDENT

Appellants in person.

Garth McBean, instructed by Garth McBean & Co for the respondent.

2 & 3 November 2009 & 4 March 2010

HARRISON JA:

[1] This is the judgment of the court.

The background to this appeal

[2] The appellants, Mr Bartholomew Brown and his wife, Mrs Bridgette Brown ("the Browns"), were members of the respondent building society ("JNBS"). On 6 June 2007 they commenced an action (Claim No. 2007/

HCV 023600) against JNBS in the Supreme Court, in which they claimed damages (including exemplary damages) under several heads. This action was served on the respondent on 16 November 2007.

[3] On 2 April 2008, JNBS filed a defence to the claim. The defence was filed out of time, thus necessitating an application for extension of time, and this application was heard and granted by Master Lindo on 8 May 2008.

[4] The Browns moved this court (by application no. 86/08) for permission to file an appeal against the Master's order out of time and, on 24 October 2008, the application was refused, with costs to JNBS. The court ordered that the matter should go back to the Supreme Court for case management (see the written judgment of Panton, P delivered on 24 October 2008). During the course of this hearing, the court was advised that a case management conference, which had previously been adjourned on 9 June 2008, was now set for 24 November 2008.

[5] The matter in due course came before Morrison J in the Supreme Court for case management on 24 November 2008. Also listed before the judge for hearing on the same date was an application by JNBS to strike out the claim on the ground that it was statute barred (a point which had been taken by JNBS in an amended defence filed on 8 October 2008) or, alternatively, for summary judgment. Morrison J granted the orders sought

by JNBS and accordingly struck out the Browns' claim, pursuant to rule 26.3(1)(c) of the Civil Procedure Rules 2002 ("the CPR"), and granted summary judgment against the Browns, pursuant to rule 15.2.

[6] On 1 December 2008 the Browns filed an application (which was relisted on 19 January 2009), in the Supreme Court for an order setting aside Morrison J's order and for summary judgment in their favour. The application was supported by a 15 page affidavit sworn to by Mr Brown. The affidavit itself ranged widely, but the grounds of the application were essentially that (i) Morrison J had flown in the face of a binding ruling of the Court of Appeal by failing to conduct a case management conference, but instead striking out their claim, and (ii) that the claim was in any event not statute barred.

[7] This application first came before Thompson-James J (Ag) on 18 December 2008, but was on that occasion adjourned to 6 May 2009, apparently because the court file could not be located. However, the application came on for hearing again before Donald McIntosh J on 14 January 2009, when it was again adjourned, this time to enable the Browns to file an appeal against the order of Morrison J made on 24 November 2008. But the application came on again before Anderson J on 5 February 2008, when it was dismissed on JNBS' preliminary objection that there was no jurisdiction in a judge of the Supreme Court to set aside

an order made by another judge of that court enjoying equal or concurrent jurisdiction.

[8] Finally, on 26 February 2009, the previous orders notwithstanding, the application was again renewed before Brooks J, who also accepted JNBS' submission, as Anderson J had done, that he had no jurisdiction to set aside the order of Morrison J, a judge of concurrent jurisdiction, and made the following order:

> "1. The application filed on 1st December 2008 and re-listed 19th January 2009, is refused.
>
> 2. Costs to the defendant to be taxed if not agreed
>
> 3. No further application by the Claimant is to be heard until the cost [sic] is paid."

The appeal

[9] On 9 March 2008, the Browns filed this appeal, challenging both the order of Morrison J made on 24 November 2008 and the order of Brooks J made on 26 February 2009 (but making no reference to the order of Anderson J made on 5 February 2009). The notice of appeal was also expansive, running into 19 pages in all, but again the gravamen of the Browns' complaint was that both Morrison and Brooks JJ had ignored the order of this court made on 24 November 2008, which was binding upon them, that the matter should proceed to case management in the

Supreme Court. The Browns also reiterated their position that their action was not statute-barred and that Morrison J had been wrong to so find.

Interlocutory applications

[10] Subsequent to the filing of this appeal, the Browns also filed at least two interlocutory applications in this court. The first was an application filed on 16 March 2009 to "vary the Court of Appeal Order and to revoke the order of the Supreme Court and for interim remedy and interlocutory injunction" (application no. 48 of 2009). This application was heard by the court on 30 March 2009 and dismissed on 2 April 2009.

[11] The Browns then filed (on 1 July 2009) a further application "for court order and for interlocutory injunction" (application No. 129 of 2009), by which they sought an order "to re-admit application to vary the orders of the courts and revoke those orders". In the alternative, they sought an order for an interlocutory injunction "and final judgment in this matter". This application, together with the substantive appeal, was listed for hearing before the court in the week of 27 July 2009, when both the application and the appeal were adjourned, the President of the court having recused himself in the light of some observations made in written material prepared by the Browns as to his conduct in relation to their matter at an earlier stage of the appeal.

The hearing

[12] It is against this background that the outstanding application and the appeal again came on for hearing on 2 November 2009. However, the court indicated to the Browns, who appeared in person, that the application for an interlocutory injunction had effectively been overtaken by the appeal itself and that in the circumstances it was proposed to proceed with the hearing of the substantive appeal.

[13] The arguments for the Browns were presented by Mr Brown, who rehearsed in some detail the history of the matter, referring to the claim itself, to the order of this court made on 24 October 2008, to the order of Morrison J made on 24 November 2008 and to the order of Brooks J made on 26 February 2009. He reiterated the submission, which had featured strongly in much of the copious documentation filed by the Browns in support of the various interlocutory applications in the Supreme Court and in this court that, this court having made an order that the matter should go back to the Supreme Court for case management, it was not competent of Morrison J to do otherwise by striking out the action.

[14] Mr Brown also submitted that, in any event, Morrison J was wrong in his conclusion that the action was statute-barred, as this was a case in which fraud and breach of trust were raised. The primary contention, as we understood it, was that the Browns' causes of action had been

concealed by fraud and that time did not therefore begin to run against them until the facts giving rise to those causes of action were discovered. In this regard, Mr Brown referred the court to and relied heavily on the decisions of the House of Lords in ***Sheldon v R H M Outhwaite and others*** [1996] 1 AC 102 and ***Cave v Robinson Jarvis & Rolf*** [2003] 1 AC 384.

[15] Finally, on the question of costs, Mr Brown submitted that the judges in the court below had erred in awarding costs to JNBS, the more appropriate order in the circumstances being that JNBS should pay their costs.

[16] Mr McBean for JNBS referred to two preliminary objections of which he had previously given notice, which was that, firstly, the appeal against the order of Morrison J was out of time and, secondly, that the rules did not permit the Browns to appeal against two separate orders made on different occasions by different judges in a single appeal, as they had done in this case. However, Mr McBean indicated to the court, quite properly in our view, that in the light of the fact that the Browns were unrepresented he was content for the preliminary objections to be treated as part of his overall response to the appeal and determined accordingly (see paras. [52] – [55] below).

[17] Taking the limitation of actions point first, Mr McBean referred us to the particulars of claim filed by the Browns and made the point that there

was no pleading alleging fraudulent concealment of facts giving rise to the cause of action. But in any event, he submitted, there was no equivalent provision in the Limitation of Actions Act to section 32 (1)(b) of the English legislation, upon which the decisions referred to by Mr Brown were based, thereby making those decisions easily distinguishable.

[18] With regard to the orders made by the judge at the case management conference, Mr McBean pointed out that JNBS' application to strike out the action had been filed on 4 November 2008, as a result of which it was before the judge at the case management conference. In these circumstances, rule 11.3(1) of the CPR was applicable, thereby entitling the judge to deal with the application at that time.

[19] With regard to the order made by Brooks J, Mr McBean submitted that that judge had no jurisdiction to set aside the order of Morrison J, this not being one of the cases in which a judge of concurrent jurisdiction is permitted by the rules to set aside such an order. Mr McBean referred on this point to rules 11.16 and 11.18, Part 13, rules 26.6 and 26.8 of the CPR. In these circumstances, Mr McBean submitted, the matter was covered by the authority of the decision of this court in ***The Gleaner Company Limited and another v Strachan*** (1997) 34 JLR 83.

[20] On the question of costs, Mr McBean submitted that there was no reason in this case for the judges in the court below not to have applied the general rule, which is that a successful party is entitled to costs (rule 64.6 (1)).

The issues

[21] The issues which arise for decision in this matter (again leaving aside for the moment the preliminary objections) appear to us to be as follows:

(i) whether it was open to Morrison J to strike out the claim and enter summary judgment against the Browns at the case management conference;

(ii) whether, assuming that he did have jurisdiction to do so, Morrison J was correct in making the orders which he did; and

(iii) whether Brooks J was correct to rule as he did on the Browns' application to set aside the order of Morrison J.

Discussion

Issue (i) – the power of the judge on a case management conference

[22] The complaint of the Browns, it will be recalled, is that in the face of the directive of this court on 24 October 2008 that the matter should proceed in the Supreme Court "with the scheduling of a new date for a

case management conference", Morrison J was wrong to have proceeded to strike out their action.

[23] Rule 25.1 of the CPR imposes a duty on the court to further the overriding objective of the rules "by actively managing cases", which includes "identifying the issues at an early stage" (rule 25.1(b)), "deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others" (rule 25.1(c)) and "dealing with as many aspects of the case as is practicable on the same occasion" (rule 25.1(i)).

[24] Rule 26.1, under the rubric "Case Management", deals with the court's overall powers of management (which are stated to be "in addition to any powers given to the court by any other rule or practice direction or by any enactment" – rule 26.1(1)). The court may, among other things, "dismiss or give judgment on a claim after a decision on a preliminary issue", (rule 26.1(2)(j), and it may also "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective" (rule 26.1(2).

[25] Rule 26.3(1)(c) also provides that the court may strike out a statement of case or part of a statement of case if it appears to it "that the statement of case or the part to be struck out, discloses no reasonable grounds for bringing or defending the claim".

[26] Finally, rule 11.3, upon which JNBS especially relies, provides as follows:

> "(1) So far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.
>
> (2) Where an application is made which could have been dealt with at a case management conference or pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances."

[27] JNBS, having by its amended defence specifically pleaded that the action was statute-barred (at para. 25), by notice of application for court orders filed on 4 November 2008, sought the following:

> "1. An order pursuant to Rule 26.3 (1)(c) of the [CPR] that the Claimant's statement of case be struck out.
>
> 2. Alternatively, an order pursuant to Rule 15.2 of the [CPR] that there be summary judgment on the claim in favour of the defendant against the Claimant.
>
> 3. An order that the Claimants pay to the Defendant costs.
>
> 4. Such further or other relief as this Honourable Court deems just."

[28] The grounds of this application were that the statement of case disclosed no reasonable cause for bringing the action and that the Browns had no real prospect of succeeding on the claim "as the alleged

causes of action arose more than six years before the filing of the suit and are therefore statute-barred".

[29] This application was fixed for hearing, in accordance with rule 11.3 (1), on 24 November 2008, that is, the date to which the case management conference had been adjourned. On that date the learned judge, it appears to us quite sensibly, decided to hear the strike-out application before proceeding to the standard case management agenda and, in the result, granted the order to strike out, as prayed. This, in our respectful view, was a procedure that the judge was fully entitled by the rules to take. Not only was the application, by virtue of the express provisions of rule 11.3(1), properly before him, but the making of an order to strike out fell squarely within the ambit of his powers under Parts 15, 25 and 26 of the CPR.

[30] An explicit objective of the CPR is to ensure that each matter is allotted "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases" (rule 1.1(1)(e)). In these circumstances, it therefore appears to us that the judge was not only entitled, but was indeed duty bound, to exercise his case management powers summarily if he formed the view that the Browns' claim as pleaded had no real prospect of succeeding.

Issue (ii) – was Morrison J correct in his assessment of the Browns' prospects of success?

[31] The Browns' claim in the Supreme Court was commenced on 6 June 2007 by the filing of a claim form, accompanied by particulars of claim. On 26 June 2008 they filed two further documents described respectively as "supplemental claim form" and "supplemental particulars of claim". The latter pair of documents appears to have been intended to amend, by expanding and giving further particulars, those originally filed, but the basic structure of the claim, as well as the particular heads of claim, remained roughly the same. (No question arises as to the propriety of an amendment in these circumstances in the light of rule 20.1, which permits a party to amend his statement of case without permission at any time before the case management conference.)

[32] In their supplemental particulars of claim, the Browns recounted the history of their dealings with JNBS in connection with a mortgage loan that was granted to them in 1993. They complained of having made payments which were not credited (or not credited in a timely manner) to their account; of their account being made to appear to be in arrears when it was not; of their being pressured to make payments to JNBS that were "not legitimately owed"; of the security for the loan having been exposed to foreclosure by JNBS carelessly and recklessly; of JNBS having made exorbitant late charges to their account; of JNBS having

threatened to sell the security without having a legal basis to do so; of JNBS having closed their mortgage account without their authority; of JNBS having by deceit and deliberate tactics attempted to overcharge them; and of JNBS having used "their institutional legal and economic power" to subject them to stress, pain and suffering, thus causing them injury and loss of income.

[33] Finally, in paras. 32 and 33 of the supplemental particulars of claim, the Browns pleaded as follows:

> "32. The Claimants expend [sic] unnecessary monies in trying to save our house from being sold and in tracking and negotiating with the Defendant which the defendants has [sic] admitted liability on the 18th of December 2006 at our meeting at the Head Office, we were told by the General Manager/Defendant that they could only pay a quarter of what the Claimants was [sic] asking; the house value over thirty five (35) millions dollars [sic] at present, that we had almost lost, at the careless administrating account practiced, of the defendant.
>
> 33. That on the 29th of October 2007 with our Attorney present at the Head Office, we were again told by the Defendant that this matter was not about liability but about quantum, so we will be seeking to have this matter examine [sic] very carefully, as the said attorney has told us many times before that in his previous meetings with the Defendant they had accepted liability, that this matter is all about quantum damages [sic], so what is the conspiracy all

about with Mr. Ward, Mr. McBean and Mr. Lorne."

[34] On the basis of all of these matters, the Browns claimed damages (including exemplary damages) for breach of contract, negligence and negligent misstatement.

[35] In its amended defence filed on 8 October 2008, JNBS took issue with the various allegations of misconduct made against it by the Browns, specifically denying some and making no admission in relation to others of them. In specific answer to paragraphs 32 and 33 of the supplemental particulars of claim, JNBS pleaded as follows:

> "23. The Defendant makes no admission to paragraph 33 of the Particulars of Claim and paragraph 32 of the Supplemental Particulars of Claim. Further and in relation to paragraph 32 of the Supplemental Particulars of Claim the Defendant avers as follows:-
>
> (a) The Defendant denies that it admitted liability on the 18th December 2006 or any other date.
>
> (b) The Defendant denies that its General Manager told the Claimants that the Defendant could only pay a quarter of what the Claimants were asking.
>
> (c) The Defendant makes no admission that the Claimants house is valued over Thirty Five Million Dollars ($35,000,000.00) as it has no personal knowledge of this.

(d) The Defendant denies that the Claimants almost lost their house as a result of careless administration accounting practices of the Defendant. Further and in any event the Defendant denies that it or its servants and/or agents were careless or negligent.

24. In relation to paragraph 33 of the Supplemental Particulars of Claim the Defendant avers as follows:

(a) The Defendant admits that the Claimants Attorney-at-Law attended its head office on the 29th October 2007 for a meeting with the Defendant's agents/servants.

(b) The Defendant says that at the said meeting without prejudice discussions were held with a view of amicably resolving the matter but the Defendant denies that it, or its servants or agents admitted liability.

(c) The Defendant denies that there is any conspiracy involving Mr. Ward, Mr. McBean and Mr. Lorne."

[36] And finally, in paragraph 25 of the amended defence, JNBS averred that the Browns' action was statute barred:

"25. The Defendant avers that the matters about which the Claimants complain in this claim arose and occurred more than six (6) years before the filing of the suit herein and the Claimants claim herein is therefore statute barred by the Limitation of Actions Act and the Statute (Jacobs 1 Ch. 16) 21 James Ch. 16."

[37] In an affidavit filed on 4 November 2009 (in obvious anticipation of the case management conference scheduled to take place on 24 November 2008), JNBS' corporate secretary and legal counsel, Mr Byron Ward, asserted that "the matter about which the Claimants complain and the alleged causes of action arose in the years 1993, 1994, 1995, 1996 1999 and 2000 which are all more than six years before the filing of the claim herein on the 6th June 2007" (para. 4).

[38] It is against this background that Morrison J came to consider JNBS' application to strike out the claim on the ground that it was statute barred. The law governing the limitation of actions in Jamaica is not, in our view, in an entirely satisfactory state. Section 46 of the Limitations of Actions Act explicitly drives one back nearly 400 years to the United Kingdom Statute 21 James 1 Cap 16, a 1623 statute (and the first limitation statute passed in England). Section 46 acknowledges that statute as one "which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island". The significance of this is to be found in section 41 of the Interpretation Act, which provides as follows:

> "All such laws and statutes of England as were, prior to the commencement of 1 George 11 Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island, shall continue to be laws in the Island, save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island."

[39] The statute referred to in this section, 1 George 11 Cap. 1, was passed by the legislature in Jamaica in 1728 and confirmed by the Crown on 22 May 1729. 1728 is therefore the date as at which all statutes of England previously "...esteemed, introduced, used, accepted, or received..." in the island fall to be treated as part of the laws of Jamaica (for a full account of these developments, see an article entitled "The reception of English Law in Jamaica", by C. Dennis Morrison, West Indian Law Journal, May 1979, pages 43-45).

[40] The result of this tortuous journey is that actions based on contract and tort (the latter falling within the category of "actions on the case") are barred by section 111, subsections (1) and (2) respectively of the 1623 statute after six years (see ***Muir v Morris*** (1979) 16 JLR 398, 399, per Rowe JA).

[41] In making the order striking out the Browns' claim, Morrison J clearly accepted JNBS' submission that none of the matters complained of by the Browns had occurred subsequent to the year 2000, with the result that their action filed in 2007 was, on the very face of it, statute barred. But before this court the Browns nevertheless maintain, basing themselves on the decisions of the House of Lords in ***Sheldon v Outhwaite*** and ***Cave v Robinson Jarvis & Rolf***, that their causes of action were concealed by

JNBS and that time did not therefore begin to run against them until the facts grounding the causes of action were discovered by them.

[42] Both of these decisions turn on the true construction of section 32 of the UK Limitation Act 1980, (as amended in 1986 and 1987). Section 32(1) provides that where in the case of an action for which a period of limitation is prescribed by the Act, either (a) the action is based upon the fraud of the defendant or (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant, or (c) the action is for relief from the consequences of a mistake, then the period of limitation does not begin to run until the fraud, concealment or mistake is discovered by the plaintiff.

[43] This section has no equivalent in Jamaican law and it therefore follows, in our view, that neither of the decisions of the House of Lords upon which Mr Brown relied has any application to this case. Although the equitable doctrine of fraudulent concealment does have a limited area of operation by virtue of section 27 of the Limitation of Actions Act (reproducing section 26 of the English Real Property Limitation Act 1833), it is clear that by its terms that that section is only applicable to suits for the recovery of land or rent, which the Browns action is not.

[44] However, it appears to us that we must also consider the effect of the Browns' allegation in their supplemental particulars of claim that JNBS admitted and or accepted liability to them during the course of what JNBS claims to have been without prejudice discussions (see paras. [33] and [36] above). This is clearly a matter on which issue has been joined between the parties on the pleadings and the question is, assuming for the moment that a judge at trial were to find in favour of the Browns on this point (and against JNBS on its contention that such discussions as there were, were without prejudice), what impact (if any) would the fact of such an admission or acceptance of liability by JNBS have on its entitlement to rely on the plea of limitation in its amended defence.

[45] The learned editors of Chitty on Contracts (27th edn, para. 28-083) make it clear that the fact that the parties have entered into discussions or negotiations for the settlement of their dispute will not, without more, affect the running of time for limitation purposes, and that the normal and prudent course for the claimant to adopt in such a situation, where time is against him, is to issue 'holding' proceedings pending completion of the negotiations. However, Chitty also makes reference to two cases in which it was held that the plaintiff was entitled to maintain his claim notwithstanding the expiry of the relevant limitation period, in one (***Wright v John Bagnall & Sons Ltd*** [1900] 2 QB 240) because the defendant was estopped by his conduct from pleading the statute, and in the other

(***Lubovsky v Snelling*** [1944] KB 44) because the court found that there was an implied agreement not to plead the statute.

[46] These cases plainly give rise to the consideration that a plea of limitation may be defeated in circumstances in which either an estoppel or an implied agreement can be established on the evidence. It seems to us that the potential impact of this on the instant case is that, in the event that a judge at trial were to accept the Browns' account of what transpired in their pleaded discussions with the representatives of JNBS, there might yet be a further question as to whether JNBS was in all the circumstances entitled to rely on its plea of limitation. This consideration attains, in our view, even greater significance from the fact that the Browns appear to have been unrepresented throughout the negotiations/discussions referred to in paras. [32] and [33] of the supplemental particulars of claim.

[47] It does not appear that any of this formed part of Morrison J's consideration of whether the Browns' claim against JNBS had any realistic prospect of success for, had it done so, it appears to us that the learned judge could well have taken the view that, issue having been joined between the parties on the pleadings on the question whether JNBS had admitted liability without reservation, these were matters to be explored

and determined at trial on the basis of the evidence adduced an both sides.

[48] We have therefore come to the view that Morrison J fell into error in this respect in that it could not be said with any certainty that the Browns had no realistic prospect of success on the matters raised by them in paras. 32 and 33 of their supplemental particulars of claim, these being entirely issues of fact which could only be determined at trial.

Issue (iii) - was Brooks J correct in refusing to set aside the order of Morrison J?

[49] In the light of our conclusion on issue (ii), we can deal with this issue quite shortly. As Mr McBean pointed out in his submissions, in our view correctly, this is plainly not one of those cases in which the CPR contemplates that a judge of the Supreme Court might be asked to set aside or vary orders or judgments of another judge of that court (see, for example, rules 11.16 – orders made on without notice applications; 11.18 – orders made in the absence of a party; rule 26.6 – judgments after striking out for failing to comply with "unless orders").

[50] In these circumstances, the application which was before Brooks J was one which was plainly covered by the decision of the Privy Council in ***Strachan v Gleaner Company Ltd & Stokes*** (Privy Council Appeal No. 22 of 2004, judgment delivered 25 July 2005). That case confirmed the rule of

long standing that a judge of the Supreme Court has no general power to correct or set aside the judgment of a judge of co-ordinate jurisdiction (per Lord Millett, at paras. 32 and 33; and see also to the same effect with regard to the power of a single judge of this court, ***Gleaner Company Limited & Dudley Stokes v Strachan*** (1997) 34 JLR 83). It is therefore clear that Brooks J had no jurisdiction (neither did Anderson J, to whom the application was first made, for that matter) to entertain the Browns' application to set aside Morrison J's order.

The preliminary objections

[51] Mr McBean had, it will be recalled, taken a couple of preliminary objections to the hearing of the appeal from the order made by Morrison J on two grounds, the first of which was that the appeal had been filed several weeks out of time. The order was made on 24 November 2008 and this appeal was filed on 9 March 2009. The rules require that an appeal in a matter of this nature, which is neither a procedural nor an interlocutory appeal, should be filed within 42 days of service of the order appealed from on the prospective appellant (Court of Appeal Rules 2002, rule 1.11(1)(c)). While it is not at all clear from either the Supreme Court's or this court's files precisely when Morrison J's order was actually served on the Browns, by the time it was signed by the judge and filed on 5 December 2008, the Browns had already (on 1 December 2008) filed notice of application for a court order setting it aside.

[52] Given this uncertainty, and in the light of rule 1.11(2) of the Court of Appeal Rules, which allows this court to extend the time fixed for the filing of an appeal (and also mindful, again, that the Browns were unrepresented), we consider this a fit case, assuming that it is required, in which to extend the time for filing of the appeal to 9 March 2009 (the date on which it was actually filed) and to order that the Notice of Appeal filed by the Browns on that date should stand. It is also right to note, we think, that Mr McBean, quite properly, as we have already indicated, did not offer any strenuous objection to the hearing proceeding, despite the late filing, and in fact participated fully in the appeal.

[53] The position in respect of Mr McBean's second ground of objection, that is, that it is impermissible for a single appeal to be brought from the decisions of two separate judges, is, in our view, not as clear. It does not appear to be either sanctioned or prohibited by the rules and in these circumstances we prefer to express no view on the question, the matter not having been fully argued before us.

A matter for mention

[54] We cannot conclude this judgment without recording a concern expressed by the Browns at the end of the first day of the hearing of this appeal. Just before the adjournment for the day was taken on 2

November 2009, Mr Brown, who was still on his feet, told the court that at some point in the past he and his wife had determined to engage the services of Messrs Grant, Stewart, Phillips & Co, a well known firm of attorneys-at-law, to provide them with advice and representation in relation to their litigation against JNBS. However, Mr Brown told us, they were advised that there would be a conflict of interest in the firm acting for them, as from time to time the firm also provided representation to JNBS. Their concern was that a member of this court, Phillips JA, then Miss Hilary Phillips QC, had at the material time been a partner in Grant, Stewart, Phillips & Co, although Mr Brown did not say that either he or Mrs Brown had ever met or spoken to her personally. Naturally, consequent upon her appointment to be a judge of this court with effect from I August 2009, Phillips JA has severed all ties with the firm.

[55] There the matter rested until the following morning, 3 November 2009, when the court sought to ascertain from the Browns whether an objection was being taken to Phillips JA continuing to hear the matter. After further exchanges with the court, and consultation with Mrs Brown, Mr Brown indicated that they had no objection to Phillips JA sitting as a member of the panel and the hearing thereafter proceeded to its conclusion, when the court reserved its judgment.

Disposal of the appeal

[56] In the light of all of the foregoing, the result of the appeal is as follows:

(i) The appeal against the order made by Morrison J on 24 November 2008 is allowed and the order for costs made in favour of JNBS is set aside;

(ii) the appeal against the order of Brooks J made on 26 February 2009 is dismissed, with no order as to costs;

(iii) the matter is remitted to the Supreme Court for a case management conference to be scheduled, before a judge who has not previously heard any application in this matter;

(iv) the Browns are to have the costs of this appeal, to be agreed or taxed.