JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00105

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA

BETWEEN	**CAN-CARA DEVELOPMENTS LTD**	**1ST APPLICANT**
AND	**CAN-CARA ENVIRONMENTS LTD**	**2ND APPLICANT**
AND	**WINSTON CHIN**	**RESPONDENT**

Nigel Jones and Dwight Williams instructed by Nigel Jones & Co for the applicants

Mrs Georgia Gibson-Henlin QC and Ms Shannon Scott instructed by Henlin Gibson Henlin for the respondent

1 and 4 February 2021

STRAW JA

[1] This is an application for extension of time to appeal against the orders of Thomas J (Ag) (as she then was), made on 13 December 2018 and for permission to appeal that decision.

[2] The applicants are also requesting that there be a stay of execution of the said orders, as well as a stay of proceedings, pending the hearing of the appeal.

[3] On 12 June 2020, Wolfe-Reece J had refused the applicants' application filed on 28 May 2019 for extension of time to apply for permission to appeal and for permission

to appeal the said orders of Thomas J (Ag). The learned judge also refused the applications for stay of execution and stay of proceedings pending the appeal. She did, however, grant leave to the applicants to appeal her order refusing the application for extension of time to apply for leave to appeal.

[4] Counsel for the applicants contends that Thomas J (Ag) erred in granting the application of the respondent filed on 7 December 2018, that the defence of the applicants be struck out, as she (1) failed to have any regard to the overriding objective of dealing with cases justly and (2) failed to consider the relevant legal principles in relation to striking out of the statement of case of the applicants.

[5] In essence, counsel contends that the non-compliance of the applicants to file witness statements, and make standard disclosure by 4:00 pm on 6 December 2018, could be described as trivial, since all these documents were filed on 7 December 2018 and there was an explanation for the failure; that in all the circumstances, the ultimate sanction of striking out should not have been imposed and this was even more so, since there had been no sanction stipulated by Thomas J (Ag) in the event of a breach. Counsel referred the court to **Durrant v Chief Constable of Avon and Somerset Constabulary** [2014] 2 All ER 757, **Mitchell v News Group Newspapers Ltd** [2014] 2 All ER 430, **Lakatamia Shipping Co Ltd v Su** [2014] 3 Costs LR 532 as well as **Branch Developments Ltd t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003.

[6] Counsel for the respondent submits that there was ample material before the learned judge to justify the order and, in light of those circumstances, there was no real chance of a successful appeal against her decision (rule 1.8(9) of the Court of Appeal Rules).

[7] Both sides agree that applications for extension of time to appeal and permission to appeal should only be favourably considered if there is a real prospect of a successful appeal (see **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2). Both sides also agree that this is an application for permission to appeal against an order made in the exercise of the learned judge's discretion. The general principle of this court, in such circumstances, is well-settled. An appeal against the exercise of a judge's discretion, will generally only succeed, if it can be shown that the judge erred in principle or failed to have regard to some relevant facts (see **Hadmor Productions Ltd v Hamilton & Others** [1982] 1 All ER 1042; **Attorney General v MacKay** [2012] JMCA App 1).

[8] We have considered the material provided by both parties as well as the thorough submissions of counsel. It is clear that the applicants have continually disregarded the various orders of the court. The factual matrix that would have been before the learned judge for her consideration included the following:

(i) At a case management conference (CMC) held on 8 July 2016, a trial date had been set for 3 to 14 December 2018;

(ii) Further CMC orders had been made on 6 March 2017 for standard disclosure on or before 31 January 2018 and for witness statements to be filed on or before 22 June 2018. The applicants were non-compliant with these orders;

(iii) On 19 September 2018, Jackson-Haisley J extended the time for the applicants (who were the 1st and 2nd defendants to the claim), as well as the 3rd and 4th defendants to comply with all the CMC orders by 28 September 2018, failing which the statement of cases would be struck out. Again the applicants were non-compliant.

[9] On 3 December 2018, when the matter came up for trial before Thomas J (Ag), the applicants were still in breach. The applicants requested permission and were allowed to make an application for relief from sanctions on 4 December 2018. This application was heard on 6 December 2018. The learned judge had before her for consideration, affidavits including one from counsel, who appeared for the applicants below. This affidavit contained material indicating some personal circumstances that would have affected the ability of counsel to prepare the documents required. Counsel, however, indicated that he had been able to complete taking the witness statements and was now able to comply with the orders made at CMC. It is clear, therefore, that the learned judge considered the explanation of counsel, as she granted relief from sanctions and ordered that the relevant documents were to be filed by 4:00 pm on that

same day. It is apparent that the intention of the learned judge was to proceed with the trial in the remaining days.

[10] In breach of Thomas J (Ag)'s orders, the relevant documents were not filed until the following day, 7 December 2018. In light of this development, the respondent, before he received the outstanding documents, had filed an application on 7 December 2018, for the applicants' statement of case to be struck out for the non-compliance. Counsel for the applicants has stated that, by the time the application was considered by the learned judge on 7 December 2018, the documents had already been filed and that an explanation had been given. This explanation was to the effect that counsel (who appeared below) had to take the documents to Mr Lincoln, the managing director of the applicants, for signatures; and that he was unable to return with the documents to the Supreme Court to be filed by 4:00 pm.

[11] It is a rather curious explanation, as one would expect that the documents and the parties necessary to apply signatures would have been present at court, so that the documents could have been filed as ordered by the learned judge.

[12] It is to be noted also, that there was not complete compliance, as there were no documents listed on the list of documents filed for standard disclosure; this breach, by itself, could have resulted in an application for the applicants' statement of case (or part thereof) to be struck out (pursuant to rule 28.14(2) of the CPR).

[13] The failure of the applicants, therefore, to meet the deadline of 6 December 2018, in all of the circumstances, is significant and could not have been described as

trivial (see **Durrant v Chief Constable of Avon**), as it continued a trend of non-compliance and would also have had a prejudicial effect on the respondent, who had obtained these trial dates from 2016, and who had attended from Antigua for the trial set for 10 days. It cannot be concluded, therefore, that the learned judge plainly erred in the exercise of her discretion, in striking out the statement of case of the applicants.

[14] The applicants have not disclosed an arguable case with a real prospect of success in order to justify the grant of the application for extension of time to appeal, permission to appeal and stay of execution. The application is accordingly refused with costs to the respondent to be agreed or taxed.