JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 115/2007

APPLICATION NO. 56/2010

BETWEEN	**PAN CARIBBEAN FINANCIAL SERVICES LIMITED**	**APPLICANT**
AND	**SEBOL LIMITED**	**1ST RESPONDENT**
AND	**SELECTIVE HOMES & PROPERTIES LIMITED**	**2ND RESPONDENT**

Patterson Mair Hamilton for the applicant

DunnCox for the respondents

8 October 2010

IN CHAMBERS

HARRIS, J.A.

[1] On 12 December 2008, an appeal brought by Sebol Limited and Selective Homes and Properties Limited was dismissed with costs being awarded in favour of the respondent Pan Caribbean Financial Services Limited. As a consequence, Pan Caribbean Financial Services Limited filed a bill of costs. The bill was taxed by the registrar on 2 February 2010. An appeal notice challenging the ruling of the registrar with respect to the hourly rates allotted to Mr Gordon Robinson and Mr Jerome Spencer,

counsel for the applicant, was filed by Pan Caribbean Financial Services Limited on 2 March 2010. The appeal notice being out of time, on 17 March 2010, an application for an extension of time to appeal the ruling of the registrar was filed.

[2] In an affidavit in support of the application for the extension of time, sworn by Mr Spencer, he averred that he was present at the taxation and after hearing from the attorneys-at-law for Sebol Limited and Selective Homes and Properties Limited, Mr Kirk Anderson, Mr Courtney Bailey and from himself, the registrar reserved her decision pending investigation as to the costs of bearer services as well as the question as to whether photocopying attracts general consumption tax. He went on to state at paragraphs 3 and 4:

> " On February 5, 2010, I received a copy of the Registrar's letter directed to our firm and Messrs. DunnCox. This letter addressed the two matters that the Registrar wished to consider on the conclusion of the taxation on February 2, 2010 and concluded with the Registrar advising on the total taxed costs payable to the Respondent. I exhibit hereto marked **"JS 1"** a copy of the Registrar of the Court of Appeal's letter of February 5, 2010 to Messrs. Patterson Mair Hamilton and Dunn Cox.
>
> By the time I received the Registrar's letter of February 5, 2010, I had already formed the view that the Registrar's decision about the costs payable could be challenged as the Learned Registrar failed to take into account all the factors set out in 65.17 of the CPR in quantifying the hourly rates for Senior Counsel and myself, as well [as] brief fees. In order to advise our client of what steps, if any, it wished to take in respect of the taxed costs awarded by the Registrar, I reviewed Rule 65.28 of the CPR and I concluded that

> our client would have 28 days from February 5, 2010 in which to file an Appeal Notice (Costs) in Form 14, and I so advised our client, even though Rule 65.28(1) of the CPR actually said that an Appeal Notice (Costs) is to be filed in 14 days in Form 29."

[3] It was also asserted by Mr Spencer that he mistakenly computed the time within which the application ought to have been filed but was later advised by the deputy registrar that the application was out of time. The failure to file his appeal in time was due to human error, he stated, and was in no way attributable to his client who had instructed him to appeal.

[4] The letter of the registrar dated 5 February 2010 to which Mr Spencer refers in paragraph 3 of his affidavit states as follows:

> "**Re: SCCA No. 115/07**
> **Sebol Ltd. & Anor. v Pan Caribbean Financial Services Ltd**
>
> Reference is made to the captioned matter and to the taxation of costs therein. As promised at the taxation hearing, I write now regarding the matter of the claim for costs in relation to attendance to file and serve/deliver documents.
>
> At the taxation hearing I was referred to the matter of SCCA No. 82/06 Antoinette Haughton-Cardenas v the [sic] General Legal Council as support for the position of counsel for the appellants that such claim should not be allowed.
>
> I have perused the said file, including the minute of order and file note of the Hon. Mr. Justice Panton, P. before whom the appeal against the taxed costs was laid on October 21 and 22, 2008.

The President made the following order:

> "Costs disallowed as follows:
>
> (a) in respect of the hearing before the Disciplinary Committee of the General Legal Council;
>
> (b) **in respect of attendance to receive:**
>
> **(i) notice of appearance;**
>
> **(ii) Court of Appeal notice of case management conference;**
>
> **(ii) Respondent's submissions; and**
>
> **(iv) Notice of motion for leave to appeal to Her Majesty [sic] in Council.**
>
> Counsel's fees for appearance for hearing of motion for leave to appeal to Her Majesty in Council reduced to $75,000.
> No order as to costs." [emphasis added]

While the aforementioned Order of the President disallows costs for "attendance to receive" the documents specified therein, it does not disallow costs for attendance to file and serve documents. It is noted that the bill of costs filed and the costs allowed at the taxation hearing in that matter also contained claims for attendance to file and serve documents such as the notice and grounds of appeal; notice of taxation; and bill of costs. These costs were not disturbed in the President's Order. Having regard to the foregoing, I am of the view that costs can be awarded for attendance to file and serve documents.

Bearing in mind the factors to be considered in awarding costs, I will allow costs for the following:

i)	attendance to deliver letter to Donovan Perkins (30/10/07)	$ 600

ii) attendance to file (supplemental bundle of authorities - 7/12/07) $ 600

iii) attendance to serve DunnCox (supplemental bundle of authorities -7/12/07) $ 600

iv) attendance to file (Bill of Costs and Notice to serve points of disputes) $ 600

iv) attendance to file Notice of Taxation $ 600

v) attendance to serve Notice of Taxation $ 600

Total $3,600

I will however disallow costs for

i) attendance to deliver (copy of letter to Donovan Perkins to Gordon Robinson) $ 600

ii) attendance to deliver to counsel (supplemental bundle of authorities -7/12/07) $ 600

iii) attendance to receive date for taxation $ 600

Total $1,800

In relation to the costs for photocopies, which was allowed at a rate of $10 per page, I have been advised that such costs do attract General Consumption Tax (GCT).

You will recall that at the taxation hearing the subtotal for costs (excluding the claims for attendance to file and serve) was computed at $532,000 and the cost for photocopies was computed at $8390. These figures plus the costs allowed above for attendance to file and serve/deliver total $543,990. GCT on that figure totals $89,758.35.

The total taxed costs would therefore be **$633,748.35."**

[5] Mr Spencer submitted that the applicant had given a good explanation for the failure to file the appeal within the prescribed time,

the delay was not excessive; there is real prospect of succeeding on the appeal and there will be little or no prejudice to the respondents should the order be granted. The overriding objective, he urged, favours the grant of the order for an extension of time.

[6] Mr Anderson for the respondents submitted that the length of the delay and the reasons therefore are the only two factors which ought to be considered in deciding whether in the interests of justice, the application ought to be granted and in the circumstances of the present case, it would not be just to grant an extension of time in order to permit the applicant to pursue the appeal notice. The intended appeal, he contended, is devoid of merit and has no realistic prospect of success. He further submitted that to permit the applicants to file the proposed appeal out of time would result in extreme prejudice to the respondents. In support of his submissions, he cited the case of ***Customs & Excise Commissioners v Eastwood Care Homes Ltd*** [2002] 1 CMLR 878; 2002 STC 1629.

[7] Rule 1.7 of the Court of Appeal Rules, permits the court to extend time for compliance with any rule, practice direction or order of the court. It cannot be denied that the court, in considering an application for an extension of time to perform an act must always be mindful of the overriding objective under rule 1.1 of the Civil Procedure Rules which

requires the court to deal justly. Accordingly, such an application must be considered within the criterion as to what is just and fair.

[8] The case of ***Customs & Excise Commissioners v Eastwood Care Homes Ltd*** offers guidance as to the approach which the court should adopt in dealing with such an application. In that case the Customs and Excise Commissioners made an application for an extension of time for service of notice of appeal against a tribunal's decision. A delay of three days in serving the notice of appeal was due to an oversight on the part of the Commissioners' solicitors. It was held that:

> "The criterion for considering such an application had fundamentally changed under the Civil Procedure Rules 1998. SI 1998/3132. The application had to be viewed by reference to the underlying criterion of justice. Several factors had to be taken into account when considering whether an extension was to be granted. In particular, it was relevant to have regard to the length of the delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might be relevant to the prejudice issue. The broad approach, however, was not to be treated as a passport to parties to ignore time limits, as justice might be defeated if there existed a lax compliance with them."

[9] It will be readily observed from the foregoing that the court, in determining whether to grant or refuse an application for an extension of time, must pay due regard to the length of the delay, the explanation for the delay, the merits of the appeal and the prejudice caused to the

other party by the delay. All of this must be considered within the framework of the administration of justice.

[10] The first issue to be determined is the length of the delay. It cannot be denied that the delay was not excessive, it being only seven days outside of the prescribed time for bringing the appeal. However, the matter does not rest there. A further question is whether the applicant has proffered a good reason for the failure to file the notice of appeal in time. The notice should have been filed on or before 22 February 2010 but was filed on 8 March 2010. Mr Spencer stated that the failure to file the notice within the time limited for so doing resulted from an error on his part in that, he was of the view that form 14 applied. Form 14 is inapplicable to the procedure relative to any matter dealing with bills of costs. It relates to rule 42.12 which provides for the service of an order upon a person, who is not a party to a claim, whose rights may be affected by such order. Rule 65.28 (1) expressly states that an appeal notice from a decision of the registrar must be filed within 14 days by the use of form 29. It is a little befuddling to accept that Mr Spencer was of the view that he could have proceeded by way of form 14 when the procedure laid down by the respective rules are very clear and distinct. He ought to have properly carried out his research in ascertaining the correct procedure for appealing against the registrar's decision. Clearly, his explanation, in my view, does not offer a plausible excuse for his failure to conform with rule 65.28 (1).

[11] Notwithstanding that a good excuse has not been advanced for the failure to file the appeal notice in time, I will move to the issue as to whether the applicant has a real prospect of successfully pursuing an appeal. Mr Spencer submitted that on a plain reading of rule 65.17, it outlines the factors which a court must consider when quantifying the sums allowable and the registrar having failed to do so had thereby improperly exercised her discretion.

[12] There is absolutely no merit in Mr Spencer's contention that the registrar failed to apply rule 65.17 in assessing the hourly rates for the attorneys' fees. For the purpose of this application, it will be necessary to refer to rule 65.17 (1) and (3). It reads:

> "(1) Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount –
>
> (a) that the court deems to be reasonable; and
>
> (b) which appears to the court to be fair both to the person paying and the person receiving such costs.
>
> (2) ...
>
> (3) In deciding what would be reasonable the court must take into account all the circumstances, including-
>
> (a) any orders that have already been made;
>
> (b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialized knowledge;

(f) the degree of responsibility accepted by the attorney-at-law;

(g) the care, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter..."

[13] The registrar performs a discretionary role when embarking upon the taxation of a bill of costs. In the performance of such duty, the registrar is obliged to allow such costs as are reasonable and which appear to be fair to all parties. In so doing, she would be guided by rule 65.17. Rule 65.17 (3) prescribes that certain factors be taken into account when considering an amount which is reasonable and fair. It has been contended by Mr Spencer that the registrar, in making an assessment as to the hourly rates payable to both counsel, she only paid due regard to the hourly rates payable by the Court of Appeal to "counsel of similar years" and thereby asserts that she failed to pay due regard to rule 65.17 (3).

[14] In an affidavit filed by Mr Bailey, he corroborated Mr Spencer's averment that the registrar took into consideration the hourly rates payable to counsel after hearing submissions from Mr Anderson and himself, at which time Mr Spencer agreed to accept an hourly rate of $8000.00. It was also stated by Mr Bailey that the only fees which remained in dispute were those of Mr Gordon Robinson's which the Registrar indicated that $20,0000.00 would have been a reasonable hourly rate for Mr Robinson. Mr Bailey further stated that the registrar said that she was taking into account the rules, the number of years practice of the attorneys-at-law at the bar as well as the nature of the matter.

[15] I accept, as stated by Mr Bailey, that on the 2 February 2010, the registrar had ruled on the question of the fees payable to both attorneys-at-law and that she had declared that she had taken the rules into consideration. The taxation of bills of costs ranks as one of the primary duties of the registrar. She is presumed to be very conversant with the rules relating to taxation of costs. Accordingly, it would be reasonable to infer that the registrar, when quantifying the items laid for taxation, would have applied her mind to the rules and in particular, the dictates of rule 65.17 (3) and would have taken into account all relevant factors before arriving at her decision as to what is a fair and reasonable sum to be awarded with respect to counsel's fees.

[16] In my judgment, in light of the foregoing, it cannot be said that the applicant has a real chance of successfully pursuing an appeal. To permit the applicant to pursue the appeal notice would result in great prejudice to the respondents. The application is refused with costs to the respondents.