[2014] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 83/2013

APPLICATION NO 151/2013

BETWEEN	**SHURENDY ADELSON QUANT**	**APPELLANT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Ransford Braham QC and Chukwuemeka Cameron instructed by Carolyn C Reid & Co for the applicant

Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the 1st respondent

Miss Tamara Dickens instructed by the Director of State Proceedings for the 2nd respondent

1 and 29 July 2014

IN CHAMBERS

MANGATAL JA (Ag)

[1] A procedural appeal was filed on behalf of the appellant Shurendy Adelson Quant ('the applicant') on 17 October 2013, in relation to a decision of Marsh J made on 10

October 2013. On the application of the 1st respondent, the Minister of National Security and Justice ('the Minister'), Marsh J made an order for security for costs in his favour. The applicant's written submissions in respect of the appeal were not filed and served at the same time as the notice of appeal was filed. The submissions were not filed until 24 October 2013 and were not served on the Minister until 13 November 2013.

[2] This is an application filed on 15 November 2013, by which the applicant seeks an extension of time to file and serve the written submissions. The application as originally filed sought only time to file the submissions out of time. However, as a result of an application to amend made and granted at the hearing, the applicant clarified that he also seeks an extension to serve the written submissions out of time.

[3] Some of the stated grounds of the application are as follows:

> "1...
>
> 2. The Appellant has to date not received a copy of the written Judgment and as such was hampered in preparing the Written Submissions in a timely manner.
>
> 3. The time that ought to have been spent on preparing the Written Submissions was spent preparing the notes of the oral Judgment.
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> 4. The length of time taken to file the Written Submissions was in no way inordinate [sic] at worst it was three (3) days out of time.
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> 5. The Appellant have [sic] a good chance of success based on a perusal of the grounds of Appeal and the Written Submissions.
>
> 6. The Respondents have not been prejudiced by the delay of three (3) days."

[4] Rules 2.4(1), (2), (4) and (6) of the Court of Appeal Rules ('the CAR') provide as follows:

> "**Procedural appeal**
>
> 2.4 (1) On a procedural appeal the appellant must file and serve written submissions in support of the appeal with the notice of appeal.
>
> (2) The respondent may within 7 days of receipt of the notice of appeal file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal.
>
> ...
>
> (4) The general rule is that consideration of the appeal must take place not less than 14 days nor more than 28 days after filing of the notice of appeal.
>
> ...
>
> (6) The general rule is that any oral hearing must take place within 42 days of the filing of the notice of appeal."

[5] The application is supported by the affidavit of Chukwuemeka Cameron, attorney-at-law, being one of the attorneys-at-law on the record for the applicant. In that affidavit, Mr Cameron at paragraph 17 stated that "... bearing in mind that weekends are not counted when parties are required to file documents within ... (7) days and that the 21st of October was a public holiday the Written Submissions were at most ...(2) days out of time or ...(3) days after the Notice of Appeal was filed".

[6] In paragraphs 13 and 14 of the affidavit, the applicant's attorney stated that the reason for the delay is that he did not have the written judgment and was therefore hampered in preparing the written submissions in a timely manner. Further, that the

time that should have been spent preparing the written submissions was instead spent preparing the notes of oral judgment.

[7] On 10 October 2013, Marsh J made the following orders:

> "1. The Claimant's application to strike out paragraphs 6 & 7 of the Affidavit of Sundiata Gibbs filed on July 19, 2013 is dismissed;
>
> 2. The Claimant gives security for the 1st Defendant's costs of this claim in the sum of $1,596,000.00 on or before 30 days from the date of this order, i.e. by November 9, 2013;
>
> 3. The sum of $1,596,000.00 is to be paid into an interest bearing account in the joint names of the Claimant's and the 1st Defendant's attorneys-at-law pending the outcome of the claim;
>
> 4. If the Claimant fails to provide the security within the stipulated period, the claim is struck out with costs to the 1st Defendant;
>
> 5. Costs of the applications to the 1st Defendant to be taxed if not agreed; and
>
> 6. Leave to appeal granted to the Claimant."

[8] The applicant has filed a notice of appeal against the orders listed at paragraphs 1, 2, 3 and 5 only.

[9] When the matter arose for hearing on 3 July 2014, learned Queen's Counsel, Mr Hylton, who appeared for the Minister, took a preliminary point. It was pointed out that one of the orders made by Marsh J was that the claim is to be struck out if the applicant fails to provide the security within the stipulated time ('the Strikeout Order'). A sanction was therefore imposed in the event that the applicant did not comply with the order requiring him to pay the security for costs ('the Order for Security').

[10] Mr Hylton further pointed out that the applicant did not apply for a stay of execution of the Order for Security and was therefore obliged to pay the security for costs by 9 November 2013. Learned counsel argued that the applicant did not pay the security within the stipulated time and as a result his claim was struck out.

[11] It was submitted that this court should not hear the applicant's extension of time application for the following reasons:

(a) There is no pending claim; and

(b) The claim cannot be reinstated if the appeal is granted.

[12] In support of those submissions, reference was made to rule 26.7(2) of the Civil Procedure Rules 2002 ('the CPR'), which provides that:

> "Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction...."

[13] What this means, the submission continues, is that the claim remains struck out unless the applicant applies for and obtains relief from the sanction that was imposed for him having failed to comply with the Order for Security. Since the applicant has not applied for relief from the sanction there is, the argument continued, presently no pending claim on which the appeal can be based. Consequently, it was argued, that the court could not hear the appeal.

[14] It was further posited that even if this court can hear the appeal, it cannot reinstate the claim because the applicant did not appeal against the Strikeout Order, as shown by the notice of appeal.

[15] Miss Dickens, who appeared for the 2nd Respondent, the Attorney General, adopted the submissions of Mr Hylton QC.

[16] Mr Braham QC in response on behalf of the applicant argued that the appeal seeks that the order of Marsh J be set aside –see paragraph 4 of the notice of appeal under the heading "Orders sought". He candidly conceded that it would have been convenient and clearer to have included in the notice of appeal, a specific ground dealing with the Strikeout Order. However, he contends that it was not necessary so to do because the learned judge made certain fundamental orders, i.e. the Order for Security, and he also made consequential orders, such as the Strikeout Order. If one is, for example, learned counsel posited, faced with an order striking out a claim, one can still appeal that striking out order, even if, (as would obviously be the case), the claim no longer stood. Reference was made to the Judicature (Appellate Jurisdiction) Act, and the rights of appeal therein granted and protected. Mr. Braham submitted that the fulcrum of the order was really the Order for Security, and it must follow that the Court of Appeal would be entitled to set aside the Strikeout Order. Reference was made to rule 2.15 of the CAR. Rules 2.15(a), (b) (a), (b), and (4) state:

> **"Powers of the court**
>
> 2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –

(a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and

(b) power to –

(a) affirm, set aside or vary any judgment made or given by the court below;

(b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;

...

(4) The court may exercise its powers in relation to the whole or any part of an order of the court below."

Ruling on Preliminary Point

[17] I ruled that the preliminary point should be dismissed and that it was appropriate for me to hear the application. This was because:

(a) the fact that there may be no pending claim, (as argued in the Minister's written submissions), does not affect the applicant's appeal, and

(b) the Court of Appeal has wide powers as set out in rule 2.15 of the CAR, to which Mr Braham referred, including powers to set aside or vary any judgment or order of the court below.

[18] In relation to (a), it seems to me that the appeal has a life independent of the existence of the claim. In relation to (b), I expressed the view, in agreement with Mr Braham, that the fulcrum of the order of Marsh J was the Order for Security. It seemed to me that the respondents could therefore yet argue about whether the claim could or

could not be reinstated (on the basis of the grounds of appeal as filed) at a different stage of this matter, i.e. at the hearing or consideration of the procedural appeal. In other words, this is not a point that needs to be dealt with at this stage of the matter or preliminarily to my hearing of the application. It ought not to prevent me from hearing the application. The Strikeout Order is really conditional on the Order for Security not being paid. Further, it is specifically required under rule 24.4 of the CPR that the judge, on making an order for security for costs on the application of a defendant also order that the claim be stayed until such time as the security is provided in accordance with the terms of the order and/or that if not so provided by a specific date, the claim be struck out. If, therefore, this court finds that the Order for Security ought not to stand, and sets that order aside, then there would no longer be an order for security for costs, which was the only substratum upon which the Strikeout Order operated. In other words, the Strikeout Order was contingent on the existence of the Order for Security. Having therefore, dismissed the preliminary point, I proceeded to hear the application for extension of time.

Background

[19] Before dealing with the application itself, it may be useful to provide an abbreviated background of the circumstances. This is a case in which the applicant was detained by the police in Jamaica on 3 April 2013. The applicant is a national of Curacao. Although a number of allegations were made, and questions were asked of him by the police, the applicant was not charged with any offence. At a stage in the proceedings and while detained, the applicant was presented with a deportation order

purportedly signed by the Minister on 5 April 2013. The applicant's attorneys on his behalf on 9 April 2013 filed an application for habeas corpus and for leave to apply for judicial review of the deportation order. As part of the interim relief sought, there was an application for a stay of the deportation order included in the application for leave. When the matter came up inter partes in the Supreme Court on 10 April 2013, the legal representative from the Attorney General's department who appeared, being Ms Althea Jarrett, the Director of State Proceedings, advised that she represented both respondents, and indicated that she had not yet been able to receive instructions. The matter was then set for consideration on 12 April 2013. At that time a consent order was also entered before the judge by the applicant's attorneys and the attorneys for the Minister and 2nd Respondent agreeing that there would be a stay of the deportation order until the determination of the matter. The matter was set for consideration on 12 April 2013. However, contrary to the terms of the consent order, the applicant was deported from Jamaica on 11 April 2013, pursuant to the deportation order signed by the Minister. On 12 April 2013, when the matter came up in the Supreme Court, Ms Althea Jarrett, who represented both respondents, indicated to the court that she had informed the Commissioner of Police and his officers, all the persons who she considered that she was obliged to inform, about the consent order.

[20] As a consequence of all that transpired, the applicant brought contempt proceedings against both respondents. In the claim filed by the applicant on 26 April 2013, there was also a complaint regarding certain pronouncements that the Minister is alleged to have made on 11 April 2013, at a public forum which it was averred tended

to and/or were calculated to interfere with the administration and course of justice. In the particulars of claim filed on behalf of the applicant, it was alleged that the Minister had notice of the terms of the consent order because his legal representative was present in court when the order was entered into, and further, that based upon the information provided by Ms Jarrett in court, the applicant verily believed that the Minister had been advised of the terms of the consent order. In an affidavit filed subsequently to the filing of the claim by the applicant, filed 17 July 2013, Ms Jarrett indicated that when she was before the court on 12 April 2013 she did not indicate or suggest that she had informed the Minister of the consent order. Further, that she has never spoken with or otherwise communicated with the Minister in relation to the subject proceedings. It is in respect of this claim involving contempt proceedings and regarding the Minister's pronouncements that the Minister applied for security for costs.

The application for extension of time

[21] Mr Braham submitted that the delay in this case, in terms of filing of the written submissions, and even the service of them, was minimal. In the case of the filing, he submitted, it was a few days, and in respect of the service, it was approximately three weeks. Reference was made to this court's decisions in ***Peter Haddad v Donald Silvera*** SCCA No 31/2003 Motion No 1/07 delivered 31 July 2007, ***CVM Television Ltd v Tewarie*** SCCA No 46/2003 delivered 11 May 2005, and ***Dorothy Vendryes v Richard and Karene Keane*** [2010] JMCA App 12. It was learned Queen's Counsel's submission that the cases make a distinction in emphasis in relation to the prospects of success on appeal, between the cases dealing with applications for permission to appeal

out of time, as opposed to applications to extend time for the filing of the record of appeal, or skeleton arguments or submissions. In the case of the former, greater emphasis is placed upon the prospects of success on appeal whereas in the latter, no affidavit of merit is required (per McIntosh JA (Ag) as she then was, at paragraph [50] of ***Vendryes***). In the applications concerning procedural default, the main factors to bear in mind, he argued, are the length of the delay, the explanation for the delay, and the question of prejudice. It was learned counsel's submission that the applicant appears to have given a good explanation for the delay in filing; this being that his counsel thought it fit to await the judgment of the court. He argued in the alternative, that even if it was not a good explanation, it was some explanation, and further, that there was no prejudice to the respondents that an order of costs could not compensate.

[22] Counsel further submitted that, in the event that the court takes the view that consideration should be given to the merits of the case, this is a case that has some merit. Mr Braham submitted that rule 24.3 of the CPR requires that the court make an order for security for costs against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. In these circumstances, Mr Braham submitted, it was not just for the order for security to have been made. It was noted by the court that in this regard, in his affidavit filed on behalf of the applicant, Mr Cameron at paragraph 21 referred to the English decision of Teare J, in ***JSC BTA Bank v Ablyazov & others*** [2011] EWHC 2500 (Comm). Reliance was placed on that decision for the principle that it is not just to order security for costs in

favour of a party alleged to be in contempt of court orders before the contempt hearing is resolved.

[23] In response to a question from the court, Mr Braham conceded that in counsel's affidavit, there was no explanation for the delay in serving the written submissions on the Minister. However, he submitted that there is no evidence of prejudice to the respondents and that, notwithstanding the absence of an explanation about the delay regarding service, the application should be granted.

[24] Learned Queen's counsel Mr Hylton, as he did in relation to the preliminary point, presented very lucid and clear written submissions opposing the application. It was submitted that the court ought not to grant the orders sought because the applicant had failed to give a good reason for the delay and to show that he has a good arguable appeal.

[25] Reference was also made by Mr Hylton to ***Haddad v Silvera***, where it was submitted that this court held that in exercising its discretion to grant an extension of time the court should consider the following factors:

(a) the length of and the reasons for the delay;

(b) whether there is an arguable case for an appeal; and

(c) the degree of prejudice to the other parties if time is extended.

[26] As regards the length of the delay in filing the written submissions, it was submitted that the applicant's calculation is incorrect since rule 3.2(4) of the CPR does not apply in this case. In the circumstances, the court was therefore asked to find that the written submissions were not filed 2 or 3 days late as contended by the applicant; rather they were filed 7 days late. Further, the court was asked to find that the delay was not minimal, especially having regard to the fact that the rules envisage that a procedural appeal will take place no more than 28 days after filing of the notice of appeal.

[27] Mr Hylton went on to opine that the requirement for compliance with time limits was more stringent in appeals, and more so procedural appeals, than other matters. Support for this submission, learned counsel indicated, is to be found in the case of ***United Arab Emirates v Abdelghafar and Anor*** [1995] IRLR 243, at page 246, paragraph 24(3), set out at paragraph [32] below.

[28] As regards the reason for the delay in filing the written submissions, it was submitted that the reason proferred was not an acceptable reason. Additionally, learned counsel referred to the fact that not only did the applicant file the written submissions late; having done so he also went on to serve them weeks later. Hence it was submitted that the applicant has been guilty of a number of infractions in relation to time limits set out in the Rules. Mr Hylton made the point that in this court's decision in ***William Clarke v The Bank of Nova Scotia Jamaica Limited*** [2013] JMCA App 9, the court specifically held that procedural appeals can still be heard on paper (albeit

they had to be heard by a panel of three judges, and not a single judge as stated in the now void rule 2.4(3) of the CAR) - see paragraphs [64] and [104] of the judgment. Therefore, the importance of service on the respondent on time, is that without service, the respondent would be unable to respond as required by the CAR, and this late service would throw out the swift hearing time and time-table envisioned for procedural appeals.

[29] As regards the arguability of the appeal, Mr Hylton argued that the learned judge's conclusions cannot be successfully challenged. It was submitted that the applicant has no arguable appeal for the following reasons:

(a) The applicant did not file any evidence in the court below to show that he has assets within the jurisdiction to satisfy any order for costs made against him; and

(b) The unchallenged evidence that was before the court below showed that the applicant is ordinarily resident out of the jurisdiction.

[30] Having regard to all of the foregoing, Mr Hylton submitted that the application should be refused. Miss Dickens on behalf of the 2nd respondent adopted the submissions made on behalf of the Minister.

Discussion and Analysis

[31] In my judgment, the guiding principles are well set out by McIntosh JA (Ag) (as she then was) in ***Vendryes***, at paragraph [50]. Having reviewed a number of

authorities, including ***Haddad***, ***CVM*** and ***Auburn Court Limited v The Town and Country Planning Appeal Tribunal & Ors*** SCCA No 70/2004, delivered 28 March 2006 and a number of English decisions, including ***United Arab Emirates*** and ***Finnegan v Parkside Health Authority*** [1998] 1 All ER 595, McIntosh JA stated as follows at sub-paragraphs c, e and f:

> "[50] Based on the above review, this court arrived at the following conclusions:
>
> ...
>
> c. Although the length of the delay is a factor to be considered there is no principle to be extracted from the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay is but one factor to be considered by the court in its aim of dealing fairly with the parties, avoiding prejudice, saving expenses and ensuring that that the cases are dealt with expeditiously. (see for example ***Finnegan v Parkside Health Authority*** referred to above).
>
> ...
>
> e. While the likelihood of the success of the appeal is a factor for the court's consideration, there is no requirement for an applicant to file an affidavit of merit. There is no principle enunciated in any of the authorities reviewed which required such an affidavit.
>
> f. ***Haddad*** was not an authority for the proposition, advanced by counsel for the respondents, that the applicant for extension of time must file an affidavit not only explaining the delay but also showing the merits of the appeal. In dealing with the issue of merit, (which was raised in that case by the applicant's counsel, who had complained that it was a factor which was not considered by the single judge), all that the court was saying was that there was no evidence in that regard before the single judge for his consideration, not that this was a deficiency in the application. The emphasis of the

court was on the inadequacy of the explanation, as assessed by the single judge. (And, it is at least noteworthy that neither ***CVM*** nor ***Auburn Court***, two decisions of this court, appear to have been cited before the single judge)."

[32] I have found the decision in ***United Arab Emirates***, cited by Mr Hylton very helpful. In this decision at paragraphs 20-25 and 29(3), Mummery J discussed general principles which are useful in relation to applications for extension of time. The learned judge stated the following at paragraphs 23(2), 24(3), and 29(3), pages 245-246:

> "23...
> (2) As Sir Thomas Bingham MR pointed out in ***Costellow v Somerset CC***, supra, at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute:
>
> > '...The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met...'
>
> The second principle is that:
>
> > '... a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate...'
>
> 24.
>
> (3) The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as

> to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.
> ...
>
> 29 ...
>
> (3) If an explanation for the delay is offered, other factors may come into play in the exercise of the discretion. It is, of course, impossible to make an exhaustive list of factors. The Appeal Tribunal will be astute to detect any evidence of procedural abuse, questionable tactics or intentional default. The Tribunal will look at the length of the delay which has occurred, though it may refuse to grant an extension even where the delay is very short. Extensions have been refused, even where the notice of appeal was served only one day out of time... The merits of the appeal may be relevant, but are usually of little weight. It is not appropriate on an application for leave to extend time for the Tribunal to be asked to investigate in detail the strength of the appeal. Otherwise there is a danger that an application for leave will be turned into a mini-hearing of the substantive appeal. Lack of prejudice or of injustice to the successful party in the original proceedings is also a factor of little or no significance. If there is irreparable concrete prejudice, that will strengthen the opposition to the application for extension; but even if there is no prejudice, the application may still be refused."

[33] I will turn now to the facts of this case and apply the principles to be gleaned from the cases. I will deal firstly with the length of the delay. The notice of appeal was filed on 17 October 2013. The written submissions of the applicant were required by rule 2.4(1) of the CAR to be filed at the same time. They were not filed until 24

October 2013. I start with the fundamental principle that time limits set by the rules are expected to be observed and a party in default has no entitlement to an extension of time. Mr Hylton is clearly correct in his submission that rule 3.2(4) of the CPR does not apply in this case, for the reason that that rule applies to computation of time for doing a specific act. It does not deal with the computation of time in cases where, as here, there has been a delay in doing an act. In this case the written submissions were filed a week after they should have been, which means, in the ordinary reckoning of time, that they were filed 7 days late, and not 2 or 3. The written submissions were served on 13 November 2013, which means that by ordinary calculations, they were served 27 days late, which is a little under a calendar month late. Learned Queen's Counsel for the Minister has asked me to find that these periods of delay are not minimal, particularly having regard to the fact that the rules envisage that a procedural appeal will take place no more than 28 days after filing of the appeal. It may well be that in theory that is how the relevant rules and time lines should operate. However, in practice, it has unfortunately not been possible for procedural appeals to be considered no more than 28 days after the filing of the notice of appeal. In fact, since the decision in ***Clarke*** referred to by learned Counsel, it has become even harder for that to happen since the procedural appeal has to be considered by three judges, and not a single judge, as originally envisioned by rule 2.4(3) of the CAR. Thus, it has not at all been the norm or usual practice for procedural appeals to be heard within that relatively short time frame. In all the circumstances, therefore, it seems to me that viewing the matter reasonably,

proportionately, and fairly, the delay both in the filing and the serving of the written submissions cannot be said to be lengthy, egregious or inordinate.

[34] I turn now to consider the reasons for the delay. The applicant's counsel has provided as an excuse for the late filing, the fact that he did not have the written judgment at hand and also spent the time that should have been spent preparing the written submissions preparing instead notes of the oral judgment. That is not a feeble excuse, but it is not a model explanation either. When it comes to procedural appeals, I agree with Mr Hylton particularly where, as here, the learned judge appears to have given a detailed oral judgment, that it was quite possible to have filed the written submissions along with the notice of appeal. Although the explanation is not one that is good, (it is a border-line sort of reason), it is nevertheless some reason being offered.

[35] However, that is not an end of the consideration of the reasons for delay. I turn now to a consideration of that aspect of the matter that has most occupied my deliberations. It is the fact that no reason has been proferred for the delay in serving the written submissions. It was, as Mr Hylton argued, important for the submissions to have been served on time, because without them, the Minister was arguably not in a position to file any written submissions he might have wished to make in opposition to the application. Further, of course, the late filing had a domino effect in that it would or reasonably might prevent the respondent from being able to comply with his own 7 day deadline from the filing of the notice of appeal (which should have

been accompanied by, the applicant's written submissions), set out in rule 2.4(2) of the CAR. The lack of explanation is somewhat puzzling, as it has occurred in relation to the relatively longer period of default. Further, in an application for an extension time in relation to procedural default, the matter of the length of the delay and the reasons for it, are most material. Indeed, it seems that addressing the issue of service out of time was not properly contemplated by the attorneys having conduct of filing the relevant papers. This is clear because it was not until the hearing that an application was made orally to amend the application for an extension of time to include an extension of time in relation to the late service.

[36] However, at the end of the day, I have had to bear in mind a number of principles emerging from the cases. The first is, that as stated by P Harrison JA in the ***CVM*** case, where in discussing reasons for delay having to do with the respondent's lawyer's default, his Lordship stated: "The delay was not that of the respondent [himself]. The interest of the respondent not to be excluded from the appeal process due to the fault of his counsel, is an aspect of doing justice between the parties." I also bear in mind, that as stated by Mummery J in ***United Arab Emirates***, at paragraph 22, the exercise of a judicial discretion to extend time should not be operated by a rigid rule of thumb, but must be operated in a principled manner in accordance with reason and justice. As he there stated "Discretions are not packaged, programmed responses".

[37] Looking therefore, at the matter in the round, whilst there has been no reason put forward specifically in relation to the period of delay in respect of the service, there has been some explanation put forward for delay, even if it fell short or was inadequate to cover the entire spectrum. I also bear in mind the consideration that the absence of good reason for any delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension - see ***Vendryes*** at paragraph [48].

[38] I turn now to consider the reference by Mr Hylton to paragraph 24(2) at page 246 of the decision on ***United Arab Emirates***, where the court stated that the court views time limits more strictly on appeals. In my view, that statement has to be viewed in the context of what is said earlier in the passage by Mummery J sitting on the Employment Appeal Tribunal. That is, that if the party aggrieved by a decision has already had a trial heard and determined on its merits, the court will deal more strictly with an application for an extension of time. In the instant case, the applicant has not in fact had a trial on the merits. His appeal is in relation to an interlocutory, procedural order, a security for costs application made against him early in the proceedings. On the other hand, because it is a procedural appeal, the rules contemplate that an appeal should be dealt with promptly. At the end of the day, the question of delay, though of primary importance, is but a factor to be weighed in the balance when the court considers what is fair and just in the circumstances.

[39] I will now discuss the question of the merits of the appeal and their relevance. As stated by McIntosh JA in ***Vendryes***, there is no requirement for an affidavit of merit, but the merits are nevertheless relevant. I agree with the statement at paragraph 29(3) of ***United Arab Emirates***, that whilst the merits of the appeal are relevant, this court ought not on an application for an extension of time in relation to procedural default, to investigate in detail the strength of the appeal. This is because one wants to avoid the danger of the application being turned into a "mini-hearing of the substantive appeal". The applicant was granted permission to appeal by the learned judge in the court below. Having looked at the relevant papers, but not in any great detail, it cannot be said that this is an appeal that has no real chance of success. This is particularly so in relation to the question whether it was just to make an order for security for costs, having regard to all of the circumstances (indeed, the somewhat special and unusual circumstances concerned with allegations of contempt). I note in passing that there is no application by the Minister seeking to have this court set aside the permission to appeal, pursuant to rule 1.13(b) of the CAR. This application for extension of time is being made in relation to procedural default per se, and I agree with Mr Braham that these circumstances are clearly distinguishable from a number of other situations where the issue of the merits of the appeal fall squarely within the court's main purview for examination. This would occur for example when an application is being made to this court for permission to appeal after refusal by the court below, pursuant to rule 1.8(9) of the CAR.

[40] I turn to a consideration of the question of prejudice. Although affidavit evidence was filed on behalf of the Minister, that evidence addressed late service. It did not address or point out any prejudice to the Minister if this application were to be granted. Mr Hylton did submit that the prejudice to the Minister is clear from the nature of the proceedings, which were filed from April 2013, and which continue to hang over the Minister's head, so to speak (my words). He posited that this would be prolonged if this application to extend time were to be granted. The absence of particular prejudice to the Minister, is a relevant consideration. In addition, it seems to me that there is in the circumstances no prejudice to the Minister, the nature of which could not be compensated for in costs. On the other hand, if the application is not granted, the doors of access to the court will be closed to the applicant. This is particularly so because of the existence of the consequential Strikeout Order. I note however, that the factor of any prejudice being capable of being compensated by costs may be of less weight in the context of an appeal in relation to an order for security for costs.

[41] In my judgment, having regard to all of the circumstances, it is just, fair and reasonable to grant the application. I therefore make the following orders:

(1) The time for filing and serving the applicant's written submissions is extended until 13 November 2013.

(2) The applicant's filing of the written submissions on 24 October 2013 and service on the 13 November 2013 is allowed to stand.

(3) The 1st respondent is granted until 12 August 2014 to file written submissions in opposition to the appeal, if so advised.

(4) Costs to the 1st Respondent to be taxed if not agreed.