JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL

MOTION NO. 12/99

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	LEYMON STRACHAN	PLAINTIFF/APPLICANT
A N D	THE GLEANER CO. LTD.	1ST DEFENDANT/ RESPONDENT
A N D	DUDLEY STOKES	2ND DEFENDANT/ RESPONDENT

Earl Witter and Maurice Frankson, instructed by Gaynair & Fraser, for the plaintiff/applicant

Emil George, Q.C. and Richard Ashenheim, instructed by Dunn, Cox, Orrett & Ashenheim, for the 1st defendant/respondent

R. N. A. Henriques, Q.C. and Yolande Whitely, instructed by Dunn, Cox, Orrett & Ashenheim for the 2nd defendant/respondent

October 11, 12, 13 and December 6, 1999

HARRISON, J.A.:

This is an application by motion dated May 14, 1999, for extension of time to apply for leave to appeal against the order of Smith, J.. made on May

15, 1997, dismissing a motion to set aside an order of Walker, J. (as he then was), made on September 20, 1996.

The history of this matter is that the applicant, on January 27, 1992, filed a Writ of Summons and a Statement of Claim against the respondents claiming damages for libel. Appearance was entered by the respondents on February 4, 1992, but no defence was filed. On April 9, 1992, the applicant entered interlocutory judgment in default of defence. On September 23, 1992, a summons to proceed to assessment was heard; then, the respondents were represented by counsel. Damages were assessed before Bingham, J. (as he then was), and a jury on May 16, 1995, and final judgment was given.

On May 17, 1995, notice and grounds of appeal were filed by the respondents and on May 19, 1995, on the application of the respondents, Downer, J.A., granted a stay of execution with a condition that the respondents lodge into an interest-bearing account the sum of $1,000,000. On July 22, 1995, the final judgment was drawn up. The Registrar of the Court of Appeal notified the parties of the hearing of the appeal listed for hearing on June 17, 1996. Previously, on April 4, 1996, the respondents filed in the Supreme Court a notice of motion to set aside the judgment of May 16, 1995, and for leave to file a defence on the basis of fresh evidence obtained. The hearing of the motion began on May 28, 1996, and on September 20, 1996, Walker, J. (as he then was), set aside the said judgment of May 16, 1995, and gave leave to the respondents to file their defence. On November 19, 1996, on an application by

the respondents to discharge the stay of execution of May 19, 1995, Downer, J.A., refused the application and discharged the order of September 20, 1996. On a further application, the Court of Appeal on January 22, 1997, discharged the order of Downer, J.A., and ordered that the said sum of $1,000,000 be paid out to the respondents. The effect of this was that the order of September 20, 1996, was restored. The respondents accordingly withdrew their appeal filed on May 17, 1995.

On February 4, 1997, the applicant filed a notice of motion for leave to appeal the order of September 20, 1996. On March 4, 1997, the applicant also filed a notice of motion to set aside the said order. The latter motion was heard by Smith, J., on May 15, 1997, and dismissed on a preliminary objection by the respondents that he had no jurisdiction to hear the motion. He refused leave to appeal. However, Smith, J., gave no reasons for his decision. The motion filed on February 4, 1997, was withdrawn. The applicant, by motion dated May 28, 1997, appealed against the order of Smith, J., and at the hearing concluded on October 13, 1998, the Court of Appeal, by a majority, struck out the appeal on the preliminary objection of the respondents on the ground that the applicant had not sought from the said Court of Appeal leave to appeal the order of Smith, J., being an interlocutory order. The reasons of the court were handed down on December 18, 1998. As a consequence, the instant re-listed notice of motion for enlargement of time within which to apply for leave to appeal and, for leave to appeal, dated May 14, 1999, is now before us.

Mr. Witter, for the applicant, argued before us that the application for extension of time ought to be granted because Smith, J., was in error in holding that he had no jurisdiction to set aside the order of September 20, 1996. The latter was a nullity, because it purported to set aside a judgment after a trial, fully participated in by the parties. The delay on the part of the applicant is due to the fact that he was "out of pocket" and the court has an unfettered discretion to grant the extension of time. He concluded that leave ought only to be refused if the applicant has no arguable case or prospect of succeeding, because the dominant issue is one of lack of jurisdiction and the question of delay must be weighed against that factor.

Mr. Henriques, Q.C., for the second defendant/respondent, submitted that the discretion of the court should not be exercised because there is no material before the court to show any reason for the inordinate delay of 6 ½ months before the filing of the instant notice of motion, and, the mere statement of impecuniosity is insufficient. If a sufficient reason is shown, the court should only then consider whether or not there is any merit in the appeal. Smith, J., was correct in coming to his decision on the point of jurisdiction argued and, in addition, having examined the order made on September 20, 1996, rejected the bold statement of nullity which was not supported by authority in respect of the said order.

Mr. George, Q.C., for the first respondent, adopted the arguments of counsel for the second respondent, and stated that the applicant did not show,

as he must, a sustained effort to appeal, and that the respondent would be prejudiced, if the application was granted because they withdrew their appeal at the invitation of the Court of Appeal.

The power of the Court of Appeal to grant extension of time is contained in rule 9 of the Court of Appeal Rules, 1962. Rule 9 provides:

> "**9.--(1)** Subject to the provisions of sub-section (3) of section 16 of the Law and to rule 23 of these Rules, the Court shall have power to enlarge or abridge the time appointed by these or any other Rules relating to appeals to the Court, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these or any other Rules relating to appeals to the Court in any other way where this is required in the interests of justice."

In considering the grant of extension of time, the court is guided by the awareness of the fact that the applicant has been tardy in his conduct and, notwithstanding the delay, seeks the exercise of the discretion of the court. The court is also mindful of the merits of the applicant's case, because it would be futile to allow him to proceed, where it is apparent that his case is bound to fail at trial. The authorities show how the courts have considered this issue.

The reasons for the delay must be given by the applicant and if his affidavit fails to disclose a sufficiently satisfactory one, the court is unlikely to

exercise its discretion in his favour. In ***City Printery v. Gleaner Co.*** [1968] 13 W.I.R. 127, an application for extension of time within which to file the record of appeal was refused, the Court of Appeal holding that the delay of almost two years caused by the fact of clerical changes in the office of the applicant's solicitor was not a sufficient reason to attract the exercise of the court's discretion. Luckhoo, J.A., cautioning that the discretion must be judicially exercised, referred to the observation of the Judicial Committee of the Privy Council in ***Ratnam v. Cumarasamy*** [1964] 3 All E.R. 933. In upholding the decision of the Supreme Court of the Federation of Malaya, dismissing an application for extension of time within which to file the record of appeal, the Board observed:

> "The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

In ***Thompson v. Thompson*** (1980-83) Cayman Islands Law Reports 63, on a motion for leave to file notice of appeal out of time, the Court of Appeal, relying on the cases of ***City Printery v. Gleaner Co.*** (supra), ***Ratnam v. Cumarasamy*** (supra) and ***Revici v. Prentice Hall Inc.***[1969] 1 W.L.R. 157, inter alia, found that no satisfactory explanation for the inordinate delay of two years and ten months was given, and refused the application to extend time.

In ***Norwich and Peterborough Building Society v. Steed*** [1991] 2 All E.R. 880, in granting an extension of time in which to file notice of appeal, the Court of Appeal emphasised that it would take into account the length of delay and the reasons therefor but also consider the merits and any prejudice to the respondent, even though the reasons for delay were acceptable. Lord Donaldson, M.R., stated at page 885:

> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant."

In the instant case, on the above authorities, the applicant would need to show the reasons for his delay in applying for leave to appeal in order to induce the court to grant the extension of time he seeks.

The court would, in addition, consider the merits of his case to determine whether or not, if good reasons are shown, it would serve any useful purpose to permit the case to proceed further. The order of Smith, J., was made on May 15, 1997, and an application for leave to appeal was made and refused. The applicant thereafter on May 28, 1997, filed a notice of appeal against the said order contending (incorrectly as held by the Court of Appeal S.C.C.A. 54/97) that it was a final order. This was struck out by a majority of the Court of Appeal on October 13, 1998, and the reasons therefor were given on December 18, 1998. The applicant had, as a consequence, shown a

consistent intention to pursue his right to appeal, albeit by a process that found no favour with the court. As a consequence, the applicant filed the instant motion for extension of time on May 14, 1999, a delay of approximately five months.

The applicant, in advancing the reasons for his delay, relied on the affidavit of Leymon Strachan dated January 7, 1999, which at paragraph 7 reads:

> "7. That the delay in filing the Notice of Motion for Leave to Appeal is not deliberate but is due to the circumstances outlined herein."

and exhibited to the said affidavit, was the affidavit also of Leymon Strachan, dated February 4, 1997, in which he related a history of continuous litigation in the matter, from January 24, 1992, when he commenced the action to the date of the said affidavit, stating in paragraph 19:

> "19. That I did not give instructions to my Attorneys-at-Law to file an appeal against the Order of Mr. Justice Walker for the reason that I was out of pocket at the time having regard to the expenses which I had incurred in prosecuting the matter."

The applicant's plea of impecuniosity as the reason for his delay is a plausible one, in my view, and, in the circumstances, sufficiently explains the delay of five months to enable the court to exercise its discretion in his favour.

In addition, a more modern view of the principles influencing the grant of extension of time for the filing of process is reflected in the case of ***Finnegan v. Parkside Health Authority*** [1998] 1 All E.R. 595, which

considered the cases of ***Ratnam v. Cumarasamy*** (supra) and ***Revici v. Prentice Hall Inc.*** (supra), inter alia. On the facts of the case, the appellant had applied for extension of time to file a notice of appeal against an order of the master who had struck out her claim for want of prosecution. She was 57 days out of time and the judge who heard her application dismissed it on the basis that he was bound by authority to conclude that in the absence of any explanation of the delay, there was no material before the court on which it could exercise its discretion in the appellant's favour. The Court of Appeal disagreed with the latter approach. The headnote reads:

> "***Held*** -- When considering an application for an extension of time for complying with procedural requirements, the court had, under Ord 3, r 5, the widest measure of discretion. Accordingly, the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognise the overriding principle that justice had to be done. Since prejudice formed part of the overall assessment and was a factor that needed to be taken into account in deciding how justice was to be done, it followed that the judge had erred in entirely disregarding it."

That case is of sufficient persuasive authority to compel us to incline towards a similar view with respect to an application for extension of time. The circumstances of each particular case must be looked at in order to determine what is the justice of the case including in the instant case the merits of the case.

Smith, J., on May 15, 1997, on a preliminary point of lack of jurisdiction, dismissed the motion to set aside the order made on September, 20, 1996, which itself had set aside the trial and judgment of Bingham, J. (as he then was), and a jury on May 16, 1995. The said motion was in the alternative:

> **(1)** that there was no jurisdiction to set aside the order of September 20, 1996, and;
>
> **(2)** that Smith, J., pursuant to section 41 of the Judicature (Supreme Court) Act, reserved for the consideration of the Court of Appeal the question of the validity of the said order, while an appeal was pending.

No reasons for his decision were given by Smith, J., and therefore this court has been deprived of the benefit of his thoughts, and must therefore revert to an examination of the law and the record to determine the question of merit.

A judge of the Supreme Court, undoubtedly, has the statutory power to set aside a judgment in default of appearance (section 77 of the Judicature (Civil Procedure Code) Law, "the Code") in default of pleading (section 258) or under section 354 of the Code where at a trial a judgment has been entered but the defendant did not attend. Section 354, which appears under the sub-head "Proceedings at trial", reads:

> "**354.** Any verdict or judgment obtained <u>where any party does not appear at the trial</u> may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after <u>the trial</u>." [Emphasis added].

In none of these instances would the defendant have participated prior to judgment. hence they would remain default judgments. The power of the court to set aside such judgments is reflected in the well-known principle in the case of *Evans v. Bartlam* [1937] A.C. 473, in which Lord Atkin said at page 480:

> "The principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

In *Mason v. Desnoes & Geddes* [1990] 38 W.I.R. 214, the power in a master or a judge of the Supreme Court to set aside a default judgment under section 354 of the Code was re-affirmed.

An assessment of damages by a judge or a judge with a jury is a trial [see *Mills v. Lawson et al* (1990) 27 J. L. R. 196] and that being so, if it is conducted inter partes, the judgment cannot take on the flavour of a default judgment. and therefore would not be subject to the setting aside of the provisions of section 354 of the Code. The dissatisfied party would have to proceed by way of appeal.

In the instant case. the interlocutory judgment was entered in default of defence on April 9, 1992. This could have been set aside under the provisions of section 258 of the Code: it was not. On May 16, 1995, when damages were assessed by Bingham, J. (as he then was), and the jury and final judgment was entered. the said interlocutory judgment merged with the final judgment (*Mills Lawson v.* [supra]). Mr. Henriques did concede this latter point. It is my view

that the said interlocutory judgment no longer existed, and thereafter could not properly be set aside. On merger, the interlocutory judgment lost its character of being interlocutory and was then a final judgment.

Consequently, based on the finding of this court in ***Mills v. Lawson*** (supra), the effect of the order made on September 20, 1996, is that the interlocutory judgment of April 9, 1992, was "set aside", leaving untouched the assessment of damages by Bingham, J. (as he then was), and the jury on May 16, 1995. If a trial was then or is now held, in accordance with the said order, would the assessment of May 16, 1995, then re-attach itself to a finding of liability or would the said assessment stand along with a new award of damages at the new trial? This picture presents anomalies of enormous proportions. A plea of res judicata could well arise at such a "new trial".

One cannot ignore the dictum of Rowe, P., in ***Broad v. Port Services Ltd.***, S.C.C.A. 58/87 dated June 13, 1988, when this Court of Appeal reversed the order of the Master who on July 13, 1987, set aside the interlocutory judgment entered on January 22, 1985 "and all subsequent process." This order by the Master was made on an application during the currency of the hearing of the assessment of damages, inter partes, which was adjourned to facilitate such an application. Rowe, P., said at page 3:

> "...we are clearly of the view that <u>having submitted to the assessment</u>, and having entered upon it, if there was anything which was going wrong in the assessment, <u>the only course open to the respondent</u>

> was to appeal against the decision of the judge either then or when the matter had been finalized." [Emphasis added].

I have been unable to find any precedent of a final judgment being set aside as in the circumstances of the instant case. Consequently, I am of the view that there is merit in the contention that the order of September 20, 1996, is without force and may not stand. If that is so, it is arguable that Smith, J., was in error when he declined jurisdiction because he had the jurisdiction to set aside an order of a judge of co-ordinate jurisdiction; (***Minister of Foreign Affairs v. Vehicles and Supplies Ltd.*** [1989] 39 W.I.R. 270; ***Mason v. Desnoes and Geddes*** [supra].) He may do so in particular ex debito justitiae when the order to be set aside is itself made without jurisdiction (***Chief Kofi Forfie v. Seifah*** [1958] 1 All E.R. 289, following **Craig v.** ***Kanseen*** [1943] 1 All E.R. 108). See also ***Anlaby v. Praetorius*** (1888) 20 Q.B.D. 764.

I find that reasons have been shown of a sufficiently strong nature to advance on appeal the question whether, where judgment is entered by default and an order is made to proceed to assessment and such assessment is conducted inter partes before a judge and jury, the parties may still treat the final judgment as a default judgment and so would entitle a party against whom judgment is entered to apply to a judge of co-ordinate jurisdiction to set aside the said final judgment.

For the above reasons, I would grant the extension of time for leave to appeal against the order of Smith, J. The notice and grounds of appeal shall be

filed within seven (7) days of today's date. The costs of this application shall be costs in the cause.

LANGRIN J.A.

I have read the draft judgments of my brothers Harrison, and Panton JJA. I agree with them and for the reasons given by them, I would grant the application. However, I would like to add a few remarks of my own.

In my view the Court has a wide discretion in considering applications for extension of time for complying with procedural requirements.

The absence of a good reason for the delay is not by itself enough to justify this Court refusing to exercise its discretion to grant an extension. A fundamental consideration for the Court is to ensure that justice is done between the parties.

An important point underpinning the application before this Court which goes to the justice of the case is whether a default judgment which proceeded to assessment of damages can be set aside outside of an appeal. An opportunity should be given to the applicant to have this important matter settled.

PANTON, J.A.

This is an application for leave to extend time within which to appeal an order of Smith, J. made on May 15, 1997. The history of the matter is somewhat tortuous but it has to be stated in order to gain a proper appreciation of the total situation.

THE HISTORY

It is nearly eight (8) years since the applicant commenced an action for defamation against the respondents. Up to seventy-six (76) days after the commencement, the respondents had not filed a defence. As a result of this failure, interlocutory judgment in default of defence was entered. The matter proceeded to assessment of damages before Bingham, J. (as he then was) and a jury. At the end of this hearing which lasted six (6) days, the jury made its award and the learned trial judge entered judgment accordingly on May 16, 1995. On the very next day, the respondents filed a notice and grounds of appeal. On May 22, 1995, Downer J.A. stayed the execution of the judgment on condition that the respondents pay $1Million into an interest bearing account in the names of the attorneys-at-law for the parties.

In the normal course of events, the appeal, it may be comfortably stated, would have been listed and heard long ago. Indeed it was listed for hearing during the week commencing June 17, 1996 but the parties requested a change to the week commencing September 23, 1996. However, there were several moves which have eventually brought us to the present position of non-determination of the appeal. The first move was the filing on April 9. 1996, by the respondents of a notice of motion in the Supreme Court to have the judgment entered on May 16, 1995, set aside and for leave

to be granted to the respondents to defend the action. This motion was based on an affidavit indicating the receipt of fresh evidence by the respondents.

The motion was heard by Walker, J. (as he then was) over a period of seven (7) days, at the end of which (September 20, 1996) he granted the respondents' request. He set aside the jury's assessment and gave the respondents leave to file and deliver their defence within fourteen (14) days of his order. He also granted to the applicant the costs thrown away - which costs have been taxed and paid over to the applicants within the time specified in the order. It should be noted that the order of Walker, J. has not been appealed, and the applicant has filed a reply in keeping with his receipt of notification of the "defence."

On November 19, 1996, the respondents sought to discharge the order of Downer, J.A. made on May 22, 1995, staying execution of the judgment of May 16, 1995. What Downer, J.A. did was to set aside Walker, J's order. On November 28, 1996, the respondents filed a notice of motion in the Court of Appeal against Downer, J.A.'s order and for a return of the $1Million deposit. On January 22, 1997, the Court of Appeal (Rattray, P, Gordon and Patterson JJA) discharged the order of Downer, J.A. (See: **The Gleaner Co. Ltd. and Stokes v. Strachan** SCCA 44/95 delivered on March 21, 1997). The Court of Appeal's order, in granting the motion, specified that the sum of $1 Million on deposit was to be paid out to the respondents "on the termination of the appeal."

On March 4, 1997, a notice of motion was filed in the Supreme Court by the applicant. It sought as its main goal the setting aside of Walker, J's decision of September 20, 1996, on the ground that he lacked jurisdiction. In the alternative, it sought an order for a reference to the Court of Appeal pursuant to section 41 of the Judicature (Supreme Court) Act. When the matter came on for hearing before Smith, J.

on May 15, 1997, he dismissed it by upholding a preliminary objection that he had no jurisdiction to entertain the application. He also refused leave to appeal his order.

On May 28, 1997, the applicant filed an appeal against Smith, J's order. The Court of Appeal; [Rattray, P. Patterson, J.A. (Harrison, J.A. dissenting)] struck out this appeal on October 13, 1998, on a preliminary objection being taken that leave to appeal having been refused by Smith, J. the applicant ought to have sought the leave of the Court of Appeal before seeking to argue his appeal. The reasons for the Court of Appeal's decision were delivered on December 18, 1998. See: **Strachan v. The Gleaner Co. Ltd. and Stokes** (SCCA. No. 54/97).The applicant allowed five (5) months to pass before seeking the necessary leave.

THE LEGAL POSITION

In seeking an enlargement of time, the general position is that the applicant is expected to show good reason for the delay as well as substance in the intended appeal.

The Privy Council has said:

> "The rules of court must. prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion.
>
> If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

See **Ratnam v. Cumarasamy and Another** (1964) 3 All E.R.933,935.

This Court has stated that where it is being moved to exercise its discretion in favour of an applicant in order to enable him to file notice and grounds of appeal out of time, it must be shown that:

(i) at all material times there was a serious continuing intention to prosecute the appeal;

(ii) there is merit in the appeal; and

(iii) the delay in moving the court is understandable and excusable.

See: **Lopez v Geddes Refrigeration Ltd.** (1968) 10 J.L.R. 558; **Martins Tours Ltd. v. Senta Gilmore** (1969) 11 J.L.R. 254; **Brown v Neil** (1972) 12 J.L.R. 669.

The English Court of Appeal has given considerable attention to this area of the law and seeing that our position is similar to that of the English, it may be useful to state what is gleaned from the authorities from that jurisdiction.

"It cannot be over-stressed that adherence to the timetable provided by the rules is essential to the orderly conduct of business in the Court of Appeal:" **C M Van Stillevoldt BV v El Carriers** (1983) 1 All E.R. 699 at 703 per Griffiths, L.J. He was dealing with an appeal to a single judge of the Court of Appeal from a refusal of the Registrar of the Court of Appeal to extend the time for setting down an appeal. His judgment was delivered in open court at the invitation of the parties. He gave approval to what the registrar had said were the relevant matters for consideration in deciding whether to extend time. These matters were:

(1) length of the delay;

(2) reasons for the delay;

(3) whether there was an arguable case on the appeal; and

(4) the degree of prejudice to the defendant if time was extended.

In **Palata Investments Ltd. and others v Burt and Sinfield Ltd. and others** (1985) 2 All E.R. 517, the Court of Appeal held that when considering an application for an extension of time for appealing beyond the time limit specified, the discretion of the

Court of Appeal is unfettered and will be exercised flexibly and with regard to the facts of the particular case. It said that where the delay is very short and there is an acceptable excuse, the Court will not as a general rule deprive the appellant of his right to appeal and in such a case it will not be necessary to consider the merits of the appeal.

In **Norwich and Peterborough Building Society v Steed** (1991) 2 All E.R. 880, on which Mr. Witter placed much reliance, Lord Donaldson MR had this to say at page 885:

> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would be appellant."

Lord Donaldson also referred to "the classic statement of the elements of this equation" to be found in the judgment of Griffiths, L.J. in **CM Van Stillevoldt BV v El Carriers** (referred to above).

The facts in the **Norwich case** may be stated briefly. The applicant's sister and her husband dishonestly obtained a power of attorney from the applicant in favour of his mother whom they tricked into executing a transfer of his house in their favour. They borrowed money from the respondent building society which was registered as holder of a charge on the property. The sister and her husband defaulted. The building society sued for possession and for a declaration of its interest. The applicant, who was legally aided, counter-claimed for rectification of the proprietorship register by substituting himself as owner for his sister and brother-in-law.

The judge decided the issue against the applicant. He intended to appeal but was unable to serve a notice of appeal within the four (4) week period specified by the rules of court because of difficulties in obtaining legal aid to prosecute the appeal.

Some six and a half months later, he applied for an extension of time to appeal. The Court of Appeal in applying the considerations referred to earlier (length of delay etc.) granted the extension of time sought.

Then in a case not cited by either party to these proceedings, the English Court of Appeal has recently indicated that the most important consideration in matters of this nature is the overriding principle that justice must be done. Hirst, L.J. in delivering the judgment of the Court, rejected the notion that the absence of a good reason for the delay is always and in itself sufficient to justify the court in refusing to exercise its discretion: **Finnegan v. Parkside Health Authority** (1998) 1 All E.R. 595.

The legal position may therefore be summarised thus:

(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider -

  (i) the length of the delay;

  (ii) the reasons for the delay;

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

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

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.

THE APPLICANT'S POSITION

In the instant case, the applicant has stated that the reason for the delay is impecuniosity. Now, not every applicant will succeed on this ground. Indeed, it may

appear to be too easy an escape route that would no doubt be exploited by delinquent litigants who have no regard for the processes and procedures of the Court.

The applicant, however, does not appear to fall in this category of litigants. It is obvious, when one considers the history of this matter, that he would have been involved in not inconsiderable expenses up to the point when his effort to appeal the judgment of Smith, J. collapsed in the Court of Appeal on a preliminary objection. It is well known that legal services are not cheap. Furthermore, unlike in the **Norwich case**, legal aid is not available to the applicant. Given all the circumstances, it is not difficult to appreciate that he was probably genuinely out of pocket during the crucial period of time within which he should have properly filed his appeal. Accordingly I do not agree with Mr. Henriques, Q.C. that there is not a sufficiency of material to enable the Court to accept the applicant's statement as to impecuniosity.

Smith, J. gave no reasons for his decision. His failure to do so cannot be taken to mean that his decision is not subject to debate. There appears to be an unprecedented legal situation created by the judgments of Walker, J. and Smith, J. The fact that it is unprecedented does not mean that they are wrong. It also does not mean that they are right. Certain issues were placed before Smith, J. for determination. He declined on the basis of lack of jurisdiction. Was he really without jurisdiction? The novel nature of the situation bellows for a final determination. It cannot be regarded as a matter without substance. There are clear issues for argument and resolution. Jurisdictional matters are not to be taken lightly. They require final determination in order to ensure that the procedures of the Court may have an air of predictability.

Mr. George, Q.C. pointed to the possibility of prejudice. He said that the respondents' appeal against the judgment entered on May 16, 1995, was withdrawn at the suggestion of the Court of Appeal. It should not be overlooked that the withdrawal

of the appeal was a voluntary act on the part of the respondents. They would have assessed the situation prior to acting as they did. One consideration that they would have borne in mind was the possibility that the applicants might seek an extension of time- successfully. In any event, there is nothing to prevent the respondents making an application to either restore their appeal or extend time for the filing of an appeal. Taking everything into consideration, however, I would say that the prejudice, if any, to the respondents is minimal when compared with the importance of the questions raised in respect of the judgment of Smith, J.

On the basis of the views that I have expressed herein, I have no hesitation in agreeing with my learned brethren that the application should be granted.