[2025] JMCA App 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

APPLICATION NO COA2024APP00202

BETWEEN	**SANDY MARIE WOOD**	**APPLICANT**
AND	**ARC MANUFACTURING COMPANY LIMITED**	**1ST RESPONDENT**
AND	**LACKIE HORNE**	**2ND RESPONDENT**
AND	**CHARLOTTE ALEXANDER**	**3RD RESPONDENT**

Richard Reitzin instructed by Reitzin & Hernandez for the applicant

Miss Ashley Mair instructed by Mayhew Law for the respondents

23, 26 June and 17 October 2025

Civil practice and procedure – Application for extension of time to seek permission to appeal – Application for permission to appeal – Whether the proposed appeal has merit – Whether the applicant's claim is one for wrongful dismissal or unfair dismissal – Whether the learned judge erred in striking out the applicant's claim for defamation as being an abuse of process – Whether the learned judge erred in finding that the court lacked the jurisdiction to try the claim – Whether the learned judge erred in granting an extension of time to dispute the court's jurisdiction – Judicature (Appellate Jurisdiction) Act, section 11(f) – Court of Appeal Rules, 2002, rules 1.8(1) and (2) – Civil Procedure Rules, 2002, rule 9.6

STRAW JA

[1] This is a relisted application filed on 10 February 2025 for permission to appeal the orders of Orr J (Ag) (as she then was) ('the learned judge') made on 29 February 2024 and for an extension of time within which to seek permission to appeal. The

applicant also seeks a stay of the orders pending the hearing and determination of this application and the appeal, in the event the application is granted.

[2] By her orders, the learned judge, so far as relevant, (1) struck out the applicant's claim for defamation against the respondents, as being an abuse of process and likely to obstruct the just disposal of the proceedings; (2) granted the respondents an extension of time within which to apply to dispute the court's jurisdiction under rule 9.6 of the Civil Procedure Rules, 2002 ('the CPR'); (3) determined that the court did not have jurisdiction to hear the applicant's claim against the respondents for breach of the implied term of mutual trust and confidence and for wrongful dismissal (which was determined to be a claim for unjustifiable dismissal); and (4) entered judgment against the applicant in favour of the respondents, with costs to the respondents to be paid by the applicant.

[3] Permission to appeal this decision was sought in the court below and refused by the learned judge on 19 December 2024. An application for permission to appeal was first filed in this court on 20 September 2024, and a relisted application was filed on 10 February 2025. It is this relisted application that we now consider.

Background

[4] The applicant was employed to the 1st respondent, ARC Manufacturing Company Limited ('ARC') for 13 years in various capacities in the cement department. By her amended particulars of claim filed on 5 August 2022, she contended that on 23 November 2016, she was called into a meeting with Mr Lackie Horne and Ms Charlotte Alexander, employees of ARC, and the 2nd and 3rd respondents herein. The meeting was held in the presence of several other employees within the cement department and a security guard. During that meeting, Mr Horne accused the applicant of being a thief and making plans to steal ARC's cement. Two days later, on 25 November 2016, the applicant was called into a second meeting with Mr Horne, Ms Alexander, a truck driver, two police officers and a security guard. On that occasion, the truck driver was escorted out by the police and the applicant was accused of conspiring with the truck driver to steal from ARC. On that same day, in front of a large crowd of people, the applicant was again accused of

planning to steal from ARC. Subsequently, three police officers arrested the applicant. The arrest took place in front of a large crowd of people. The applicant was initially taken to the Hunts Bay Police Station and then to the Duhaney Park Police Station, where she was kept for five days and subsequently released without charge.

[5] By an affidavit sworn on 22 February 2021, Mr Horne and Ms Alexander exhibited a letter dated 25 November 2016 (the same day of the applicant's arrest), addressed to the applicant from ARC and terminating the applicant's employment. According to the letter, the applicant was made redundant with immediate effect and paid notice pay along with various other emoluments, less sums owed to ARC.

[6] Arising from these circumstances, the applicant brought a claim against the respondents claiming damages for defamation, breach of the implied term of mutual trust and confidence, and wrongful dismissal. The applicant contended that ARC did not undergo a restructuring exercise and that instead she was dismissed summarily and was wrongfully dismissed. A claim was also brought against the Attorney General of Jamaica, in connection with her arrest.

[7] In response to the claim, on 22 February 2021, the respondents filed an application to strike out the claim form and particulars of claim, for the court to decline jurisdiction to try the claim for wrongful dismissal, and for judgment to be entered in favour of the respondents. This application was later amended to, among other things, include an application for summary judgment and for an extension of time within which to apply for the court to decline jurisdiction.

[8] It was this application by the respondents that resulted in the judgment and orders of the learned judge made on 29 February 2024 and which the applicant now seeks an extension of time to apply for permission to appeal and for permission to appeal.

The decision of the learned judge

[9] In considering the respondents' application, the learned judge determined that there were five main issues for her determination as follows (see para. [9] of the judgment):

> "a) Whether the court can grant summary judgment on a claim for defamation;
>
> b) The limitation period for claims made pursuant to the Defamation Act;
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> c) Whether the court can extend the time for a party to challenge the court's jurisdiction;
>
> d) Whether this court has the jurisdiction to consider a claim for breach of the implied term of trust and confidence in a contract of employment, and lastly;
>
> e) The jurisdiction of this court to determine a claim for wrongful dismissal."

[10] The learned judge also considered a further preliminary objection raised by counsel for the applicant, specifically that the respondents had amended their application to cure certain deficiencies pointed out by the applicant, without the court's permission. The learned judge determined that the amendments did not require the court's permission as the CPR did not restrict a party's ability to amend a notice of application. She stated further that the court would use its case management powers to determine the best manner in which to deal with late amendments to a notice of application. She concluded that there was no prejudice to the applicant arising from the late amendments.

[11] The learned judge also determined, based on rule 15.3 of the CPR, that the respondents' application for summary judgment on the defamation claim could not be granted. Notwithstanding this, based on section 33 of the Defamation Act 2013, and in light of the applicant's failure to seek an extension of time to bring a defamation claim, the defamation claim was statute-barred, the limitation period having expired. The claim for defamation was accordingly struck out.

[12] Concerning the application for an extension of time to dispute the court's jurisdiction, the learned judge had regard to rules 9.6 and 26.1(2) of the CPR and the cases of **Texan Management Limited & Others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 ('**Texan**') and **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 ('**Fiesta Jamaica Limited**'). She accepted that an extension of time could be sought after the time for filing a defence had passed. Further, that the delay in making the application was not inordinate, and an explanation was provided for the delay. The learned judge was of the view that the application raised a serious consideration and the respondents stood to suffer greater prejudice if an extension of time were not granted.

[13] In considering the jurisdiction point, the learned judge concerned herself only with the applicant's pleadings (see paras. [98] and [99] of the judgment). She then contrasted the law on wrongful dismissal at common law and the law on unfair or unjustifiable dismissal. She examined the various authorities cited and applied them to the applicant's pleadings. She found that the applicant was seeking damages well above that payable on a claim for wrongful dismissal and that the applicant was asking the court to determine whether there was a true redundancy exercise (see paras. [120] and [121] of the judgment). In essence, the claim was one for unjustifiable dismissal, the determination of which lay within the jurisdiction of the Industrial Disputes Tribunal pursuant to the Labour Relations and Industrial Disputes Act ('the LRIDA'). The learned judge also concluded that the court could not award damages for any breach of the implied term of mutual trust and confidence. As such, it was her conclusion that the court lacked the jurisdiction to hear and determine the claim.

The application

[14] In support of the application for extension of time to seek leave to appeal, an affidavit was sworn on 24 June 2025 by Shavanae Leckie, a legal clerk employed by Reitzin and Hernandez. She explained that following the delivery of the judgment by the learned judge, an application for permission to appeal was filed in the Supreme Court on

10 March 2024. This was within the required 14 days to seek permission to appeal in the Supreme Court. However, no application for permission was filed in this court. The learned judge refused permission to appeal on 19 December 2024 and on 31 December 2024, the applicant filed an application for permission to appeal in this court. Ms Leckie indicated further that she was informed by Mr Reitzin and believed that, based on a brief discussion that he had with counsel for the respondents, Miss Ashley Mair, he was under the impression that the preliminary objection that the application for permission to appeal was out of time, would not be pursued with vigour. These facts were proffered to address the length of the delay and as the explanation for the delay in making the application.

[15] With respect to the merits of the proposed appeal, the application set out 38 proposed grounds of appeal as follows:

> "**The overall holding**
>
> 1. The learned judge erred, as a matter of law, in holding that the applicant's claim was not for wrongful dismissal as pleaded but, rather, that it was for unfair or unjustifiable dismissal.
>
> **The principal order**
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> 2. The learned judge erred, as a matter of law, in striking out the applicant's statements of case, i.e. her claim form and her amended particulars of claim.
>
> **The enabling order – the extension of time**
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> 3. The learned judge erred, as a matter of law, in extending the time within which the first respondent would be permitted to argue that the court should not exercise its jurisdiction to hear the applicant's claim.
>
> <u>Failing to apply rule 9.6</u>
>
> 4. The learned judge erred, as a matter of law, in failing to apply the mandatory provisions of rule 9.6 of the Civil Procedure Rules, 2002 to the first

respondent's application for an extension of time in so far as it provided that a party who wishes to argue that the court should not exercise its jurisdiction may apply to the court for a declaration to that effect within the period for filing a defence.

Failing to apply the date of deemed service

5. The learned judge erred, as a matter of law, in failing to apply the provisions relating to the deemed date of service upon a company by prepaid registered post under the Civil Procedure Rules, 2020, the Interpretation Act and the common law.

6. The learned judge erred, as a matter of law, in regarding service of the claim form and particulars of claim upon the first respondent by registered prepaid post as purported service.

7. The learned judge failed to have any, or any sufficient, regard to the fact that the uncontested and unchallenged evidence before the court was that the registered article containing the claim form and particulars of claim arrived at the Whitfield Town Post Office (the relevant post office) on 12 August, 2020 and was only returned, uncollected to the Half Way Tree Post Office on 15 September, 2020 – 34 days later.

Failure to rule evidence inadmissible

8. The learned judge erred, as a matter of law, in failing to address, adequately or at all, the applicant's objections to the inadmissible material proferred in support of the first respondent's application for the extension of time.

9. The learned judge erred, as a matter of law, in failing to appreciate and hold that the first respondent's application for an extension of time to argue that the court should not exercise its jurisdiction was bereft of evidential support.

Failure to identify any procedural error

10. The learned judge erred, as a matter of law, in failing to appreciate and hold that the defendants did not assert and prove any breach by the applicant of any rule of procedure – that being an essential ingredient of any application to argue that the court should not exercise its jurisdiction to hear a claim – this in accordance with the principles identified and enunciated in **Hoddinott v Persimmon Homes (Wessex) Ltd** [2007] EWCA Civ 1203, [2008] 1 WLR 80640 per Dyson, LJ at [25] followed in **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 241 and **Rayan Hunter v Shantell Richards & Stephanie Richards** [2020] JMCA Civ 1742 per McDonald-Bishop, JA (Morrison, P and Foster-Pusey, JA agreeing) at [20].

The relevant factors

11. The learned judge erred, as a matter of law, in failing to appreciate and hold that none of the factors which the court could and should have taken into consideration in exercising its discretion whether to extend time favoured the first respondent and that, in fact, all of those factors favoured the applicant.

No explanation for the delay

12. The learned judge erred, as a matter of law, in failing to appreciate and hold [sic] there was no explanation for the first respondent's delay in applying for an extension of time to argue that the court should not exercise its jurisdiction to hear the applicant's claim.

Whose fault was the delay

13. The learned judge erred, as a matter of fact, in failing to appreciate and find as a fact on the uncontradicted and unchallenged evidence before the court that the first respondent failed to attend at the post office on a sufficiently regular basis to collect registered mail.

14. The learned judge erred, as a matter of fact, in failing to find, on the uncontradicted and unchallenged evidence before the court, that the registered article containing the applicant's claim form and particulars of claim remained at the post office for 5 weeks (less one day) - uncollected.

15. The learned judge erred, as a matter of law, in failing to appreciate and hold that the first respondent's non-receipt of the claim form and particulars of claim was effectively the direct result of, and/or orchestrated by, the first respondent in failing to take any reasonable and proper steps to monitor receipts of registered articles at its post office but that non-receipt did not affect the fact of deemed service.

16. The learned judge erred, as a matter of law, in failing to appreciate and hold that the delay of some 5 months between the date by which the first respondent's defence should have been filed and the date of the first respondent's application for an extension of time was entirely due to the first respondent's negligence in failing to attend the post office in a timely manner to check on the arrival of registered articles.

17. The learned judge erred, as a matter of law, in failing to appreciate that a party cannot take advantage of his own wrong: **Charles Robertson Gordon v William Sowden Holland (British Columbia)** [1913] UKPC 7(19 February 1913; **Saunders v Anglia Building Soc (sub nom Gallie v Lee)** [1970] UKHL 5 (09 November 1970 [sic] and applying that principle of law to the first respondent's application.

<u>The wrong date</u>

18. The learned judge erred, as a matter of law, in holding that the effective and relevant date for the purposes of calculating the first respondent's delay in applying for an extension of time was the date of receipt by the second and third respondents of the claim form and particulars of claim – rather than the dae of deemed service.

The wrong test

19. The learned judge erred, as a matter of law, in holding that part of the test for determining whether to extend time was whether the first respondent's delay was, or was not, 'egregious'.

Lack of merit

20. The learned judge erred, as a matter of law, in failing to appreciate and hold there was no merit in the first respondent's proposed argument that the court should not exercise its jurisdiction to hear the applicant's claim on the basis that the applicant's claim was for unfair or unjustifiable dismissal 'dressed up' as wrongful dismissal.

21. The learned judge erred, as a matter of law, in failing to appreciate that it was not acceptable to decide the respondents' application for an extension of time and to strike out on a basis upon which the respondents' did not rely, namely, that the nature of the damages sought by the applicant was determinative of whether her claim was for wrongful dismissal or was for unfair or unjustifiable dismissal.

Prejudice

22. The learned judge erred, as a matter of law, in failing to appreciate and hold that the prejudice to the applicant in extending time far outweighed any prejudice to the first respondent since the court's holding meant that the rules for protecting the applicant and for facilitating the due administration of justice did not apply in her favour but, rather, could be put to one side in favour of a recalcitrant applicant (the first respondent) and that the applicant's case would be struck out - there being no greater form of prejudice.

23. Having held at [32] that it could not be over-emphasised that counsel and parties alike must always comply with the rules and orders of the court as that ensured good and efficient administration of justice the learned judge failed to apply rule 9.6(3), with the

consequent extreme prejudice to the applicant, and to the unfair and unjust advantage of the first respondent.

24. The learned judge erred, as a matter of law, in failing to appreciate and hold that interpreting rule 9.6 in the way she did rendered that rule open to untold abuse as an instrument of injustice so as to render the rule designed to protect litigants and to facilitate the due administration of justice not only ineffective but extremely harmful.

Jurisdiction

25. The learned judge erred, as a matter of law, in holding that the court had no jurisdiction to hear the applicant's claim.

26. The learned judge erred, as a matter of law, in failing to appreciate and hold that the court had jurisdiction to hear and determine a claim for wrongful dismissal and to award damages in such a case for breach of contract for breach of the implied term of mutual trust and confidence.

27. The learned judge erred, as a matter of law, in holding that the damages at common law for wrongful dismissal [sic] for breach of the implied term of mutual trust and confidence were limited to the amount to which the applicant would have been entitled pursuant to the provisions of the Employment (Termination and Redundancy Payments) Act ('ETRPA') had she been dismissed.

28. The learned judge erred, as a matter of law, in failing to appreciate and hold that there was no rationale nor any authority for so holding.

29. The learned judge erred, as a matter of law, in holding that the Supreme Court of Judicature of Jamaica has no jurisdiction to award damages for breach of the implied term of mutual trust and confidence.

The court's decision on a point not foreshadowed

30. The learned judge erred, as a matter of law, in failing to appreciate that a court may not decide a case on a point not raised by one of the parties or by the court for the consideration of the parties: **Farah Constructions Pty Ltd v Say-Dee Pty Ltd** (2007) 230 CLR 89; [2007] HCA 22; **Friend v Brooker** (2009) 83 ALJR 724; 255 ALR 601; [2009] HCA 21.

31. The learned judge erred, as a matter of law, in failing to afford the applicant's counsel a reasonable and proper opportunity to address her and/or to furnish her with written submissions as to whether it was appropriate to decide whether the applicant's claim was for wrongful dismissal or for unfair or unjustifiable dismissal by considering the nature of the damages which the applicant was claiming.

32. The learned judge erred, as a matter of law, in failing to appreciate and hold that damages at common law for breach of, for example, an implied term of mutual trust and confidence in a contract of service, are at large as general damages.

33. The learned judge erred, as a matter of law, in failing to appreciate and hold that the fundamental principle underlying awards of damages for breach of contract, which is a substitute for performance, is that the claimant is to be placed in the same position she would have been in, so far as could be achieved by a money award, as if the contract had been performed: **Robinson v Harman** [1848] EngR 135; [1843-60] All ER 383; (1848) 1 Exch 850; 154 ER 363; 18 LJEx 202; **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29; **Sagicor Bank Jamaica Ltd v YP Seaton and others** [2022] UKPC 48.

34. The learned judge erred, as a matter of law, in failing to appreciate and hold an award of general damages for the applicant could, and should, have included the consideration that she could, but for the wrongful dismissal, have been in steady employment for many further years and that she had a reasonable and proper expectation of that.

35. The learned judge erred, as a matter of law, in failing to appreciate and hold that special damages include out-of-pocket expenses incurred as a result of the breach of contract as well as pecuniary losses, similarly caused and incurred, which are capable of precise calculation.

36. The learned judge erred, as a matter of law, in failing to appreciate that the principles of law identified and enunciated, unanimously, by the House of Lords in **Malik v. Bank of Credit; Mahmud v. Bank of Credit** [1997] UKHL 23; [1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606 (12th June, 1997) applied directly to the applicant's claim as a stigma claim rather than a manner of dismissal claim.

The defamation claim

37. The learned judge erred, as a matter of law, in failing to appreciate and hold that the second and third respondents had elected not to raise the limitation defence in relation to the applicant's defamation claim and/or had waived any right they may otherwise have had to raise that defence.

38. The learned judge erred, as a matter of law, in failing to appreciate and hold that the principles of election, waiver and estoppel identified and enunciated in **Commonwealth of Australia v Verwayen** (1990) 170 CLR 395 precluded the second and third respondents from raising a limitation defence to the applicant's defamation claim." (Emphasis as in the original)

Submissions

On behalf of the applicant

[16] In seeking to argue that the applicant has a real prospect of success on an appeal, Mr Reitzin contended that the respondents failed to satisfy the requirements of rule 9.6 of the CPR and, therefore, accepted the court's jurisdiction. Additionally, as a sanction took effect under rule 9.6, the respondents ought to have applied for relief from the

sanction, which was not done. Further, no grounds were stated in support of the application for extension of time, and the application was devoid of evidential support. Ultimately, it was Mr Reitzin's argument that the learned judge was wrong to have adopted a holistic approach in the consideration of the respondents' application for an extension of time and that ARC should not have been allowed to benefit from its negligent conduct in failing to monitor mail delivered to its registered office.

[17] Regarding the finding of the learned judge that the court did not have the jurisdiction to determine the claims for wrongful dismissal and breach of the implied term of mutual trust and confidence, Mr Reitzin asserted that the learned judge misunderstood the case of **Edward Gabbidon v Sagicor Bank Jamaica Limited (formerly RBTT Jamaica Limited)** [2020] JMCA Civ 9 ('**Gabbidon**'). He stated further that the applicant's claim was more in the nature of the case of **Malik v Bank of Credit and Commerce International SA (in liquidation); Mahmud v Bank of Credit and Commerce International SA (in liquidation)** [1997] 3 All ER 1 ('**Malik**'). Further, the learned judge ought to have found that the applicant's claim was one for wrongful dismissal, based on the pleadings.

[18] Concerning the defamation claim, Mr Reitzin maintained that the learned judge was wrong to strike out the claim and ought to have allowed it to proceed to trial.

On behalf of the respondents

[19] Miss Mair, for the respondents, in opposing the application for an extension of time to seek leave to appeal, highlighted the length of the delay (approximately seven months), the absence of a good reason for the delay, and the lack of merit in the proposed appeal.

[20] With respect to merit, it was noted that the learned judge found, based on the pleadings, that the case concerned the manner of the applicant's dismissal, which falls under the jurisdiction of the Industrial Disputes Tribunal and not the court's jurisdiction. It was argued that the claim did not allege that the applicant was denied her contractual

entitlements. As such, the learned judge correctly concluded that the court lacked jurisdiction to try the claim. Further, the decisions of the learned judge to strike out the defamation claim and grant an extension of time to the respondents to dispute the court's jurisdiction were unassailable. As such, counsel asserted that the application for permission to appeal and for an extension of time should be refused, with costs to the respondents.

Discussion

[21] The affidavit of Ms Leckie in support of the relisted notice of application was only filed on 24 June 2025, the same week in which the application was listed for hearing. The proposed appeal, being an appeal from an interlocutory judgment, required permission to appeal from the learned judge below within 14 days of the decision being given (see section 11(f) of the Judicature (Appellate Jurisdiction) Act ('JAJA') and rules 1.8(1) and (2) of the Court of Appeal Rules, 2002 ('the CAR')). The affidavit reveals that permission was sought in the court below on 10 March 2024, within the required 14-day period. The parties do not dispute that permission was refused on 19 December 2024 (there is actually no order from the court below exhibited before us to that effect). However, an application for permission from this court to appeal, ought to have been filed within the same 14 days of the learned judge's decision on 29 February 2024 (see rule 1.8(1) of the CAR and **Evanscourt Estate Company Limited (by Original action) v National Commercial Bank Jamaica Limited (by Original action); National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and another (by way of Counterclaim and Set Off)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, Application No 166/2007, judgment delivered 26 September 2008). This was not done, hence the belated application for an extension of time to seek permission to file an appeal.

[22] The principles governing an application for extension of time within which to seek permission to appeal, are set out in the cases **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No

12/1999, judgment delivered 6 December 1999 ('**Leymon Strachan**') and **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2. In **Leymon Strachan**, Panton JA (as he then was), at page 20, articulated the approach to be taken by the court in considering such applications as follows:

> "(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 timetable 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 extension of time, as the overriding principle is that justice has to be done."

[23] Each requirement will be considered in turn.

The length of the delay and the reasons for the delay

[24] The application for permission to appeal before this court was first filed on 20 September 2024(Ms Leckie's affidavit incorrectly refers to this date as 31 December 2024). It ought to have been filed by 15 March 2024. The length of delay is approximately six months, which can be described as inordinate in the circumstances. Further, the affidavit of Ms Leckie was bereft of any good reason offered by counsel for the delay. Ms Leckie's affidavit only stated that counsel thought that the objection from the respondents would not be pressed. Counsel, therefore, failed to appreciate that failing to apply within the required timeframe constituted a breach of the rules of court and could not, in any event, be waived by counsel for the respondents.

[25] However, the court is not compelled to dismiss the application on this basis. The issue of prejudice has not been raised by the respondents. I will, therefore, consider whether there is any merit in the proposed appeal.

Merits of the proposed appeal

[26] The 38 proposed grounds of appeal raised, and which Mr Reitzin asserts are meritorious, can be reduced to three substantial issues:

1) The learned judge's exercise of her discretion with respect to perceived procedural deficiencies in the application by the respondents;

2) The striking out of the defamation claim; and

3) The striking out of the claim for wrongful dismissal.

Issue one: The exercise of the learned judge's discretion with respect to perceived procedural deficiencies in the application by the respondents

[27] In relation to the complaint that the application for extension of time to decline jurisdiction was without evidential support, the learned judge considered this issue. At para. [71] of her judgment she stated as follows:

> "Firstly, save a reference in Miss Chantelle Young's affidavit which did not provide the source of her information as pointed out by Mr. Reitzin, (and which I did not consider) I found sufficient evidence to support this aspect of the defendants' application."

[28] She assessed the evidence, not only in the affidavit of the attorney, Chantelle Young, but also contained in the affidavits of Mr Horne and Ms Alexander (see paras. [75] to [77]). The learned judge also perused the documents on the court's file, including to ascertain the date of service by registered post. Her determination on the merits of the application resided in her discretion. This court is only to interfere with the exercise of a judge's discretion if "it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not

exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'" (see para. [20] of **The Attorney General of Jamaica v John MacKay** and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042).

[29] The applicant has not demonstrated any arguable case for appeal in relation to this contention.

[30] Mr Reitzin also contends that the application for the court to decline jurisdiction was made out of time and the learned judge erred in extending the time for the making of the application. Rule 9.6 of the CPR provides for the disputing of the court's jurisdiction, as follows:

> "**Procedure for disputing court's jurisdiction etc**
>
> 9.6 (1) A defendant who-
>
> (a) disputes the court's jurisdiction to try the claim; or
>
> (b) argues that the court should not exercise its jurisdiction,
>
> may apply to the court for a declaration to that effect.
>
> (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.
>
> (3) **An application under this rule must be made within the period for filing a defence.**
> **(Rule 10.3 sets out the period for filing a defence.) (emphasis supplied)**
>
> (4) An application under this rule must be supported by evidence on affidavit.
>
> (5) A defendant who -

(a) files an acknowledgment of service; and

(b) **does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.(emphasis supplied)**

(6) Any order under this rule may also –

(a) strike out the particulars of claim;

(b) set aside service of the claim form;

(c) discharge any order made before the claim was commenced or the claim form served; and

(d) stay the proceedings.

(7) Where on application under this rule the court does not make a declaration, it –

(a) must make an order as to the period for filing a defence; and

(b) may –

(i) treat the hearing of the application as a case management conference; or

(ii) fix a date for a case management conference.

(Part 26 sets out powers which the court may exercise on a case management conference.)

(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph (7)(a) and such period may be extended only by an order of the court.

(Rule 10.3(3) deals with an application to stay proceedings where there is a binding agreement to arbitrate.)" (Emphasis supplied)

[31] The respondents filed an acknowledgment of service on 22 January 2021, but no defence was filed within the time set out in the rules (see rule 10.3(1) of the CPR, which

states that the defence is to be filed within 42 days of the date of service of the claim form). The claim form was served by registered post on 5 August 2020, but the respondents' evidence is that it only came to their knowledge on 7 January 2021. Rule 9.6(3) states that the application to dispute jurisdiction must be made within the period for filing the defence. Accepting the date of service of the claim form to be 5 August 2020, the application to dispute jurisdiction was filed four months late on 22 February 2021 (the time for filing a defence does not run during the long vacation - see rules 3.4(1) and 3.5(1) of the CPR).

[32] Mr Reitzin, relying on rules 9.6(5) (a) and (b), submitted that since the respondents failed to make their application within the period for filing the defence, they have accepted that the court has jurisdiction to try the claim, thereby resulting in a sanction being imposed from which relief must be sought.

[33] The learned judge considered the above relevant rules. She also considered the Privy Council decision of **Texan** (originating from the Court of Appeal for the Eastern Caribbean), where similar rules to our rules 9.6 and 26.1(2) were considered (see paras. 26 and 30 of **Texan**). At paras. 73 to 75, Lord Collins set out the cumulative effect of these rules:

> "73. The overall effect is this. A defendant served within the jurisdiction who has reasons for applying for a stay on *forum conveniens* grounds at that time should normally make the application under EC CPR r.9.7/English CPR Part 11. It is doubtful whether failure to make such an application in time means that the defendant has conclusively accepted that the court should exercise its jurisdiction, but that will not normally matter because the court has a power to extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). It has been held that even though English CPR r. 11(5) (EC CPR r.9.7(5)) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR r.9.7(3) retrospectively after the period for defence has expired: *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch),

> [2006] ILPr 129, at [46] (a case of service outside the jurisdiction).
>
> 74. In addition, except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right: EC CPR r.26.9.
>
> 75. Together these powers are sufficient to give effect to the overriding purpose of the jurisdiction to stay proceedings on *forum non conveniens* grounds, which is to ensure that the claim is tried in the forum which is more suitable 'for the interests of the parties and for the ends of justice': *Sim v Robinow* (1892) 19 R (Ct. of Sess) 665, 668, per Lord Kinnear."

[34] In the circumstances, no application for relief from sanctions was required.

[35] Further, Mr Reitzin's submission on this point ignores rule 26.1(2)(c) of the CPR, which gives the court power to extend time for compliance with any rule, practice direction, order or direction of the court, even if the application for extension is made after the time for compliance has passed. The power to extend time is only affected by a rule that specifically precludes the court from extending time. No such rule exists in relation to rule 9.6.

[36] The learned judge considered the guidance set out by this court in **Fiesta Jamaica Limited** as to the factors for consideration in determining whether to allow an extension of time. These factors included the length of delay, the reason for delay, the potential prejudice to the other party, the effect of delay on public administration, and the importance of compliance with time limits. She considered all these issues at paras. [82] to [90] of her judgment. Mr Reitzin has failed to show where the learned judge erred by misunderstanding the law or the evidence in applying her discretion to grant the respondents' application. His reliance on **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 is without merit as no application was made in that case to

dispute the court's jurisdiction pursuant to rule 9.6 of the CPR or to seek an extension of time to do so.

[37] With respect to the service of the claim form, counsel is not correct in his assertion that the learned judge accepted the later date of service (the date of 7 January 2021, that the respondents indicated the claim form was left at the registered office) as the deemed date of service.

[38] At para. [80] of her judgment, the learned judge referred to the date of 5 August 2020 (the date of service by registered post) and accepted that the application to dispute jurisdiction would have been filed some five months out of time. She did, therefore, consider that date in her assessment. However, in considering the respondents' reasons for the delay, the learned judge indicated at para. [86]:

> "While I accept that the application was filed some nearly five months after the claim form was said to have been served on the [1st respondent] by registered post, realistically, the [respondents] could not respond to a claim that they were unaware of. They made their application within six weeks of learning of the claim which is not an excessively inordinate delay in all the circumstances. The explanation for this delay is that they were unaware of service on the 1st [respondent] as no registered receipt slip was received."

[39] The applicant has not demonstrated any arguable route to appeal in relation to this complaint or any of the others raised under this issue.

Issue two: The striking out of the defamation claim

[40] The learned judge dealt extensively with this issue at paras. [45] to [62] of her judgment. The impugned defamatory statements were made on 23 and 25 November 2016. The claim was commenced on 20 July 2020. The two-year limitation period in both instances expired on 23 and 25 November 2018, respectively, pursuant to section 33(1)(b) of the Defamation Act. A claimant, pursuant to section 33(2) of the Defamation Act, may apply to the court to extend the limitation period. Such an extension may be granted up to a maximum period of four years from the date on which the cause of action

arose (per section 33(5)(a) of the Defamation Act). The applicant made no application for an extension of time which could have resulted in an extension of time to 23 and 25 November 2020.

[41] The learned judge considered the case of **Sherrie Grant v Charles McLaughlin and another** [2019] JMCA Civ 4 and quoted para. [42] of that judgment which effectively deals with Mr Reitzin's submission that the limitation defence should be taken at the trial. It is set out here for expediency:

> "[42] Usually, the reliance on the provisions of the Limitation of Actions Act as a defence to a claim, is to be demonstrated at a trial. In certain circumstances, however, a defendant may rely on a limitation of actions defence prior to the trial. A defendant may apply to strike out a claim if it appears on the face of the claim, that it is time barred (see **Lt Col Leslie Lloyd v The Jamaica Defence Board and Others** (1978) 16 JLR 252). The basis of the application is that the claim amounts to an abuse of the process of the court (see rule 26.3(1)(b) of the CPR). A defendant may also rely on a limitation of actions point if the claimant seeks to amend his claim to add a party or to seek a remedy, which the proposed party, or the defendant, asserts is time barred."

This position had been previously stated by this court at para. [36] of the case of **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24.

[42] At para. [61] of her judgment the learned judge concluded:

> "In this case however, there is no amendment or application that can be made to enable the [applicant] to pursue her claim for damages for defamation at this late stage, some nearly eight years after the limitation period has expired. It has been accepted in this jurisdiction (**Shaun Baker**) that it is an abuse of process to commence a claim after the expiry of the limitation period (**Ronex Properties Ltd. v John Laing Construction Limited [1983] QB 398.**)"

[43] Again, the applicant has not demonstrated any basis on which the learned judge's decision to strike out the defamation claim can be challenged.

Issue three: The striking out of the claim for wrongful dismissal

[44] The dispute in relation to the jurisdiction of the court concerns whether the applicant's pleaded case was one for wrongful dismissal as against unfair dismissal (also referred to as unlawful or unjustifiable dismissal). The court has no jurisdiction to deal with claims relating to unfair dismissal. Disputes in that category are to be dealt with by the Industrial Disputes Tribunal as provided for by LRIDA.

[45] In **Gabbidon**, Brooks JA (as he then was) carried out an extensive review of the authorities relevant to wrongful dismissal as contrasted with unfair dismissal. At para. [19], he referred to the case of **Fernandes (Distillers) Ltd v Transport and Industrial Workers' Union** (1968) 13 WIR 336, in defining wrongful dismissal as follows:

> "…a determination of employment in breach of contract that cannot be justified at law…."

[46] The remedy for a wrongful dismissal is damages for breach of contract. Brooks JA, at para. [25] also referred to the seminal case of **Addis v Gramophone Company Limited** [1909] AC 488 ('**Addis**') in which the House of Lords established the common law principle that there is no entitlement to damages for the manner of a person's dismissal. The headnote of the judgment states:

> "Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment."

[47] However, the concept of an implied term of mutual trust and confidence in contracts of employment was cemented by the decision of the House of Lords in **Malik**. Brooks JA stated at para. [29] of **Gabbidon**:

> "**Malik** confirmed that an employee could recover damages for a breach of an implied term of mutual trust and confidence

> which each party, the employer and the employee, could expect of the other. The breach must necessarily have occurred during the subsistence of the employment contract. The appellants in **Malik**, who were former employees of a bank, had had their employment terminated, by way of redundancy, by the provisional liquidators of the bank. The House of Lords held that they were entitled to claim damages for their subsequent inability, because of a tarnish to their respective reputations, to obtain employment in the banking industry. That tarnish was not as a result of anything that they had done, but was due to the manner in which their employer had, unbeknownst to them, conducted its business. The House held that the employer had breached the term of mutual trust and confidence that should be implied as a term of the appellants' contract of employment."

[48] Brooks JA affirmed that **Malik**, though a House of Lords decision, is binding on this court since the Privy Council would no doubt uphold the principles decided in **Malik** (see para. [63]). This court has, therefore, accepted that the implied term of mutual trust and confidence constitutes a part of the law of this country relating to the contract of employment and is, therefore, relevant to cases of wrongful dismissal. As far as the issue of wrongful dismissal is concerned, the learned judge would, therefore, have erred when she stated that the court had no jurisdiction to award damages for breach of the implied term of mutual trust and confidence in cases of wrongful dismissal.

[49] As stated by Lord Steyn, "[t]he implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee" (see page 17a of the judgment). It must also be demonstrated that the employer acted without reasonable or proper cause (see page 22b of the judgment). The salient issue remains, however, as to whether the breach alleged by the applicant (the effect of the statements allegedly made by the 2nd respondent) fits into the category created by **Malik**. Notably, **Malik** did not override the common law principle established in **Addis** as it did not, strictly speaking, concern the manner of dismissal, but rather related to breach of contract. However, **Malik** appeared to have provided a gateway by which a case in which the manner of dismissal was said to breach

the implied term of mutual trust and confidence of an employment contract, could be brought before the court (see para. [30] of **Gabbidon**).

[50] In this regard, Brooks JA considered authorities decided subsequent to **Malik**, in order to delineate the extent to which the breach of the implied term of trust and confidence would apply to wrongful dismissal cases in this jurisdiction. Specifically, the case of **Johnson v Unisys** Ltd [2001] UKHL 13 ('**Johnson**'), which, he explained, created "the **Johnson** exclusion area". In **Johnson,** the House of Lords prescribed the cases in which a claim for breach of the implied term of mutual trust and confidence would not give a right to claim damages. At paras. [36] and [37] of **Gabbidon**, Brooks JA outlined what **Johnson** decided on the issue. He stated specifically at para [37]:

> "… The cases excluded from the right to claim damages, are those in which the alleged breach of contract is what led to the dismissal. …"

[51] Following a review of the subsequent authorities in the UK and Jamaica, Brooks JA concluded that there was no previous decision of this court presently binding it on the questions of whether the **Johnson** approach must be followed and whether the **Addis** principle remained unchanged in this jurisdiction (see para. [80] of **Gabbidon**). However, he examined the factors that supported following the **Johnson** approach (see paras. [82] to [89] of **Gabbidon**). He then concluded at para. [90]:

> "Based on the above analysis, it must be held that, in this country, there is a comprehensive alternative statutory scheme for providing a remedy where an employee is unfairly dismissed. The **Addis** principle and the **Johnson v Unisys** approach should be followed, namely, that there is no right of action for damages for an alleged breach of trust and confidence, where that breach is what led to the dismissal, or for loss, which flows from the manner of dismissal. It is for the IDT, in an appropriate case, to determine if such a dismissal, is unfair, and worthy of compensation."

[52] In my view, the applicant's pleadings reveal that the alleged breach of the implied term of mutual trust and confidence is what led to her dismissal. The amended particulars

of claim aver that between 23 November 2016 and 25 November 2016, the applicant was accused of being involved in a conspiracy to steal from ARC by Mr Horne. Later on the 25th, she was taken to the police station and placed in custody for several days, eventually being released on 30 November 2016, without being charged. She was dismissed from her employment by a letter dated 25 November 2016. The letter sent to her was annexed to Mr Horne's affidavit and spoke to the fact that she was being made redundant and that her full redundancy package, including six weeks' notice pay, was sent to her salary account in the usual manner. The applicant was, therefore, paid a full redundancy package. Whether it was a genuine redundancy is only within the jurisdiction of the Industrial Disputes Tribunal to decide and cannot be determined by the courts.

[53] The applicant did not reply to this affidavit disputing the payment. However, in her amended particulars of claim, at paras. 24 and 25, she alleged as follows:

> "24. In consequence of the publication of the words complained of, the [applicant] has been injured in her character, credit and professional reputation and has been brought into public odium and contempt and has suffered embarrassment, humiliation, ridicule and distress.
>
> 25. Further, or in the alternative, by reason of the matters alleged comprising the [first respondent's] breach of the implied term of mutual trust and confidence, the [applicant] has suffered injuries, loss and damage."

And further at para. 38:

> "Further, by reason of the matters aforesaid, the [applicant] has suffered loss and damage.
>
> **Particulars**
>
> i) In November 2016 the [applicant] was earning an average of approximately $16,000.00 per fortnight net;
>
> ii) Following her dismissal, the [applicant] was unemployed for approximately 2 years;

> iii) Thereafter, the [applicant] began her own business of selling charcoal but her earnings were very meagre – barely enough to put food on the table." (Emphasis as in the original)

[54] Based on these pleadings, Mr Reitzin contends that the applicant's claim fits into the category of wrongful dismissal as the use of the defamatory words breached the implied term of trust and confidence.

[55] It has not been denied by the respondents that the applicant was accused of criminal conduct and arrested, but the date and timing of her dismissal provide a sufficient factual basis to conclude that the alleged breach is within the "**Johnson** exclusion area". Having been accused of complicity in criminal activity between 23 and 25 November 2016, she received her termination letter on that ultimate date of 25 November 2016.

[56] Mr Reitzin has not demonstrated to this court that the alleged breach is outside the category of a manner of dismissal case and would, therefore, be actionable under the common law concept of wrongful dismissal. He has not demonstrated why the learned judge could be said to have erred in her ultimate conclusion that the proper cause of action lay within the statutory framework of LRIDA and was not actionable before the court.

[57] As with the prior two issues, I see no arguable route to a successful appeal in relation to this issue. The relisted notice of application for permission to appeal and for an extension of time to seek permission to appeal should be refused.In that regard, I would also grant the costs of this application to the respondents.

Conclusion

[58] Having considered the relisted application for permission to appeal and for an extension of time to seek permission to appeal, I have determined that the application should be refused, as the applicant has failed to demonstrate that there is an arguable case for appeal.

FOSTER-PUSEY JA

[59] I have read, in draft, the judgment of Straw JA and I agree.

SIMMONS JA

[60] I, too, have read, in draft, the judgment of Straw JA. I agree and have nothing else to add.

STRAW JA

ORDER

1. The relisted notice of application for permission to appeal filed 10 February 2025 is refused.

2. Costs to the respondents to be taxed, if not agreed.