[2013] JMCA App 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

APPLICATION NO 194/2012

BETWEEN	**ELITA FLICKENGER** **(Widow of the deceased Robert Flickenger)**	**APPLICANT**
AND	**DAVID PREBLE** **(T/a Xtabi Resort Club and Cottages)**	**1ST RESPONDENT**
AND	**XTABI RESORT CLUB AND COTTAGES**	**2ND RESPONDENT**

Ainsworth Campbell for the applicant

Miss Danielle Chai instructed by Samuda and Johnson for the respondents

11 December 2012 and 10 January 2013

IN CHAMBERS

BROOKS JA

[1] On 10 November 2010, a judge of the Supreme Court of Judicature of Jamaica, after a trial extending over the course of several years, entered judgment in favour of the respondents David Preble and Xtabi Resort Limited (Xtabi) against Mrs Elita Flickenger, who had made a claim against them. The claim arose from the tragic death by drowning, of Mrs Flickenger's husband, on 9 February 1995, at a resort property owned by Xtabi and operated by Mr Preble. Mr Preble used the trade name of Xtabi

Resort Club and Cottages for his operation. The property is located in Negril in the parish of Westmoreland.

[2] Mrs Flickenger is aggrieved by the judgment and on 23 December 2010, she filed an appeal against it. She has, however, failed to file the record of appeal within the prescribed time, despite having been given an extension of that time. Mrs Flickenger has applied for an order for a further extension of time. The application is strongly resisted by the respondents. Miss Chai, in a commendable presentation on behalf of the respondents, has urged me to refuse the application.

The history

[3] Mrs Flickenger ought to have first filed the record of appeal on or before 8 June 2012. On 5 June 2012, however, she filed an application seeking an extension of time within which to file the record of appeal and a supplementary record. On 22 June 2012, Dukharan JA considered the application on paper and granted an extension of time of three months within which to file the record. The record should, therefore, have been filed by 23 September 2012.

[4] On 21 September 2012, Mrs Flickenger filed the present application to extend the time limited for filing the record. The record was eventually filed on 6 December 2012, but without the benefit of an order extending the time. An order is needed to ratify its presence on the court's file.

The application

[5] The application seeks a further extension of three months in which to file the record. The grounds on which it is primarily based, are:

> a. "That the Appellant is experiencing great difficulty in locating some of the exhibits tendered in evidence at the trial."
>
> b. "That Attorney-at-Law for the Appellant is dealing with some other very complicated and exhausting matters in this Honourable Court that takes priority in time to this Appeal."

[6] The application is supported by affidavits by the attorney-at-law having conduct of the appeal for Mrs Flickenger, Mr Ainsworth Campbell. In his affidavit, sworn to on 20 September 2012, Mr Campbell deposed that the record of appeal had "been compiled only for the pages to be numbered". Despite that statement, Mr Campbell went on, at paragraph 6 of his affidavit, to say:

> "That the preparation and completion of the Records in this Appeal is being held up because I have been preparing for presentation in this Honourable Court and the Court below two other very absorbing and demanding matters which I am not in a position to delegate to any other Attorney-at-law."

He opined that the record would have been completed for filing by 30 December 2012.

The relevant law

[7] The court may extend the time limited for compliance with any rule (rule 1.7(2)(b)). This application is a procedural application made pursuant to rule 2.10 of the Court of Appeal Rules 2002 (CAR). Rule 2.11(1)(e) permits a single judge of the court to make an order determining such an application. The rules do not, however,

provide any guidance for the consideration of the applications. Nevertheless, there is case law that gives that guidance.

[8] This court, in **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion 1/2007 (delivered 31 July 2007), after having reviewed authorities from both the pre-Civil Procedure Rules (CPR) and the CPR regimes, gave extensive guidance for the consideration of appeals such as the instant one. The principles that may be gleaned from that analysis are as follows:

a. in the absence of specific provisions in the rules, the court, in exercising its discretion should do so in accordance with the overriding objective;

b. generally speaking, the rules of the court must be obeyed and litigants and their legal representatives ignore the rules at their peril;

c. a successful party is entitled to the fruits of its judgment and so the party aggrieved by that judgement must act promptly in pursuing its appeal;

d. 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;

e. in order to justify the court extending the time limited for carrying out a procedural step in the appellate process, there must be some material on which the court can exercise its discretion;

f. normally, if no excuse is offered for the default, no indulgence should be granted;

g. an indulgence may be granted even if the excuse does not amount to a good reason but generally speaking, the weaker the reason the more likely the court will be to refuse to grant the extension of time;

h. the application should address the length of the delay, the reason for the delay, the merits of the appeal and the likely prejudice, or absence thereof, to the respective parties;

i. strict guidelines as to the consideration of these applications should be avoided.

[9] In addition to those principles, the observations of their Lordships in the Privy Council decision of **The Attorney General v Universal Projects Limited** [2011] UKPC 37 are also relevant and instructive. Although addressing the provisions in the CPR dealing with relief from sanctions, their Lordships addressed the issue of a good explanation for a breach of the rules. They said at paragraph 23 of their opinion:

> "…To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

The application to the instant case

a. <u>The length of the delay</u>

[10] The delay in compliance in the instant case is indeed lengthy. When considered from the point of view of the date that the record was first due, the record was filed six months late.

b. <u>The reason for the delay</u>

[11] As was mentioned above, Mr Campbell, in supporting the application, gave as the reason for the delay, the fact that he was engaged in "two other very absorbing

and demanding matters which [he was] not in a position to delegate to any other Attorney-at-law". In light of the length of the delay, the reason advanced does not amount to a good reason. It is also to be noted that Mr Campbell appeared with a junior at the trial that has given rise to the instant appeal. No reason has been advanced as to why that attorney-at-law could not have assisted in preparing the record for this appeal.

[12] Although the notice of the application for the extension spoke to difficulty with securing some of the exhibits, Mr Campbell, in his affidavit, did not address this or any other reason for the delay.

c. <u>The merits of the appeal</u>

[13] The grounds of appeal, as set out in the amended notice and grounds of appeal, are expansive, but may be summarised as follows:

i) The learned trial judge failed to properly assess the evidence. His treatment of the appellant's evidence was flawed.

ii) The learned trial judge did not mention the evidence of Asher Williams and Dwight Flickinger and by implication did not consider the evidence of these parties when arriving at the judgment.

iii) The learned trial judge allowed too long a period to elapse before considering the evidence and giving judgment.

iv) The learned trial judge dealt with the issue of the location of the scene of the drowning facetiously and irresponsibly.

v) The learned trial judge failed to record vital evidence tendered in the case. Had the evidence of Asher Williams and Dwight Flickinger been considered the

Court would have been obliged to hold that the substratum of the case was present and intact.

vi) The learned trial judge failed to properly assess the evidence in light of the pleadings.

vii) The learned trial judge dealt with the case in a cavalier manner and without regard to the possible damage to the appellant's case. In particular, without notifying the Attorney-at-Law for the Appellant of his intention so to do, he extended time within which the respondent could file submissions. This shows palpable bias and impropriety to the detriment of the appellant's case.

[14] A perusal of those grounds of appeal reveals that the majority are concerned with the learned trial judge's treatment of the evidence and his findings of fact. A perusal of the written judgment handed down in the court below shows that the issue of liability depended largely on findings of fact. In particular, the questions of the presence of warning signs on the resort property concerning the danger and the risk of swimming, the status and movement of an access ladder, and a previous inconsistent statement by the applicant, were major questions to be determined. The learned trial judge resolved these in favour of the respondents.

[15] This court does not easily disturb findings of fact that are based on evidence given by witnesses at a trial (see **Watt or Thomas v Thomas** [1947] AC 484). Mrs Flickenger would, therefore, have an uphill task in attacking the judgment of the court below. That view is, of course, merely a preliminary observation.

[16] It is unlikely that the remaining grounds could cause an overturn of the judgment.

d. The prejudice to the respondents

[17] Mr Flickenger died over 15 years ago. As tragic and as traumatic as his death would have been for all concerned, it is time for the litigation to come to an end.

[18] Miss Chai brought to my attention the case of **Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)** [1978] 1 WLR 382 in which it was pointed out, at page 389F, that "[t]here is much prejudice in having an action hanging over one's head indefinitely". This court, in **West Indies Sugar v Stanley Minnell** (1993) 30 JLR 542, also found that inordinate delay, by itself, could also be relied upon as being prejudicial.

Conclusion

[19] When the elements of the length of the delay, the reason for the delay, the merits of the appeal, and the prejudice to the respondents, are considered as a whole, I find that the balance is in favour of refusing the application to extend the time. The interests of the administration of justice, as well as the general interests of the parties, especially those of the respondents, require that this case be brought to an end.

Order

[20] (1) The applications filed herein on 21 September and 6 December 2012 respectively, for extension of time in which to file the record of appeal and to include an affidavit of Ainsworth Campbell in the record of appeal, are refused.

(2) Costs to the respondents to be taxed if not agreed.