[2017] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2016

APPLICATION NO 175/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**GARBAGE DISPOSAL & SANITATIONS SYSTEMS LTD**	**APPLICANT**
AND	**NOEL GREEN**	**1st RESPONDENT**
AND	**LAURENSTON LOWE**	**2nd RESPONDENT**
AND	**DOCKERY FORBES**	**3rd RESPONDENT**

Written submissions filed by Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the applicant

Written submissions filed by Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for the respondents

10 March 2017

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

[2] The applicant on 16 September 2016 filed a notice of application seeking: (i) an extension of time within which to apply for leave to appeal and (ii) leave to appeal the orders of Campbell J dated 30 October 2015. By those orders the applicant's statement of case was struck out for failure to comply with case management orders made in the matter on 16 May 2013.

Background

[3] The respondents and the applicant named herein are the claimants and the defendant, respectively, in the court below. On 18 March 2011, the respondents commenced three separate claims against the applicant arising from a motor-vehicle collision. The claims were based on the alleged negligence of Junior Bryan, who was employed to the applicant; and the alleged vicarious liability of the applicant through Mr Bryan, reportedly its servant or agent. The applicant was given consent to file defence and a counterclaim out of time in each claim and filed a counterclaim against one of the respondents, Dockery Forbes.

[4] On 16 May 2013, the first scheduled case management conference in the matters was held, at which time George J ordered a consolidation of the claims and vacated the other case management conference dates in the other two claims. Several other case management orders were made (formal order filed on 31 May 2013), with which the respondents complied. However, the applicant failed to comply with two of those orders within the stipulated time. Those orders were as follows:

> "iv. Parties to file and serve witness statement on or before the 24th day of January, 2014
>
> v. Listing Questionnaires to be filed on or before the 31st day of January, 2014."

[5] On 31 January 2014, the respondents filed a notice of application seeking: (i) to strike out the applicant's statement of case for failure to comply with the above-stated case management orders or, alternatively; (ii) for them to be granted summary judgment on the basis that the applicant had no real prospect of successfully defending the claim; (iii) that judgment be entered in the respondents' favour and that the matter proceed to assessment of damages; and (iv) that costs be awarded to the respondents, to be agreed or taxed.

[6] Before the application was heard, the applicant, on 11 and 12 February 2014, filed its listing questionnaire and the witness statement of Junior Bryan respectively.

[7] The application to strike out the applicant's statement of case or, in the alternative, for summary judgment, was heard on 27 March 2014 by Sykes J, who made orders in the manner indicated below (as recorded in the minute of order):

> "1. Application for striking out defence and in the alternative summary judgment is dismissed
>
> 2. Costs to the applicants in the sum of $180,000.00 and such costs to be paid not later than 1:00 pm April 10, 2014 and if such costs are not paid then any application to apply for relief from sanctions shall not be heard."

[8] The costs order stipulated above was complied with. On the said 27 March 2014, the applicant filed an application seeking the following orders:

> "1. That there be an abridgement of the time within which to serve this Notice of Application for Court Orders;
>
> 2. That there be relief from sanctions on the part of the Defendant.
>
> 3. That the List of Documents filed on the 21st day of January, 2014, the Witness Summary and Witness Statements filed on the [sic] February 11, 2014 And February 12, 2014 stand as being filed.
>
> 4. No Order as to Costs;
>
> 5. Such further and/or other relief as this Honourable Court deems just;"

[9] On 15 December 2014, the application for relief from sanctions was heard by Campbell J who on 30 October 2015, delivered his decision in the matter. The judge also indicated that his orders were being granted on the respondents' application. Campbell J therefore granted the respondents' application, save and except for what had been requested as Order 2 and further ordered that:

> "1. The Defendant's Statement of case be struck out for failure to comply with Case Management Conference orders made on the 16th day of May 2013.
>
> 2. That judgment be entered for the Claimant [sic] and the matter proceed to Assessment of Damages.
>
> 3. Costs to the Claimants to be taxed or agreed."

[10] On 3 November 2015, the applicant filed a notice of application seeking leave to appeal from the orders of Campbell J. The respondents opposed that application and on 22 January 2016, Campbell J, after hearing the application, refused leave.

[11] On 29 January 2016, the applicant filed in the registry of this court a notice of procedural appeal which, on 14 September 2016, was met with the filing of the respondents' notice of opposition. By that document, the respondents contended that, pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA) the purported appellant's notice stood ineffective and was a nullity since no permission to appeal had been granted (which, they contended, was a prerequisite for filing a valid appeal).

[12] Faced with that challenge, the applicant filed the application now before the court. The application is supported by an affidavit of urgency filed on 16 May 2016, deposed to by Mrs Denise Senior-Smith, attorney-at-law. That affidavit sheds light on what may be described as the procedural challenge faced by the applicant in seeking to prosecute its appeal. There are several grounds on which the application is made. They are recited as set out in the notice of application as follows:

> "1. The Attorney-at-Law improperly interpreted the rules to mean that permission to appeal could be set out in the Notice of procedural appeal;
>
> 2. That at all times the Applicant had made it clear it was seeking leave to appeal as its first Order;
>
> 3. That the document in which that Order for leave is sought was filed within the time period required to ask for leave;

4. That the Applicant did not act in a deliberate or contumelious manner;

5. That the Respondent would not be substantially prejudiced;

6. That so soon as the Attorney became aware of the possible error an Application was filed;

7. Pursuant to Rules 1.7 (1) and (2) (a) of the Court of Appeal Rules.

8. Pursuant to Part 2.7 of the Court of Appeal Rules.

9. The Applicant has an Appeal that has a real prospect of success;

10. Pursuant to the overriding objective of the Court of Appeal Rules as amended."

Summary of submissions for the applicant

[13] The above-stated grounds encapsulate the applicant's contentions and submissions in support of its applications. In briefest summary, they speak to (a) error on the part of counsel (and not by the litigant); (b) inadvertence; (c) absence of substantial prejudice; and (d) the justice of the case.

Summary of submissions for the respondent

[14] The respondents objected to the applicant's application for an extension of time to file notice of appeal and leave to appeal. Counsel submitted that the application amounted to an abuse of process, having been prompted by the objection filed by the respondents which challenged the validity of the notice of appeal which was filed without the permission of the court here or below. As such, counsel argued that if this

court entertained the application, it would unfairly render the respondents' objection ineffectual.

[15] Counsel similarly contended that the application in question must be considered independently of, as counsel phrased it, the "defective appeal proceedings". Counsel further advanced the position that the defective nature of the appeal could not be cured, on the basis that: (i) the application had not yet been assigned a date for hearing; (ii) the respondents had not had an opportunity to respond to the merits of the application; (iii) as earlier stated, the application was prompted by the respondents' objection to the initial filing of the defective notice of appeal; and (iv) there still was no valid appeal before the court, permission to appeal and an extension of time within which to do so not yet having been obtained by the applicant.

Issues

[16] The court now has before it two issues to consider: (i) whether it should grant permission to appeal; and (ii) whether it should extend time to apply for permission to appeal.

A primary rule

[17] In relation to addressing the question of what approach the court should adopt when hearing both these types of applications together, I am not without guidance. As recognised by Smith JA in the case of **Evanscourt Estate Company Limited v National Commercial Bank** SCCA No 109/2007, judgment delivered on 26 September 2008, if permission to appeal ought not to be given, it would be futile to

enlarge the time within which to apply for permission. This, then, will be the primary rule that will guide the resolution of the application for the orders. The application for permission to appeal will be addressed first.

The application for permission to appeal

[18] It is worthwhile to remember that the application for permission to appeal pertains to Campbell J's order refusing to grant the applicant relief from sanctions and striking out its statement of case. It is useful to begin the discussion of this issue concerning permission to appeal by reference to section 11(1)(f) of the JAJA and to consider whether it applies to this case.

[19] Section 11(1)(f) of the JAJA provides that:

> "11-(1) No appeal shall lie-
>
> (a) ...
> (b) ...
> (c) ...
> (d) ...
> (e) ...
> (f) without the leave of the Judge or of the Court of Appeal <u>from any interlocutory judgment or any interlocutory order</u> given or made by a Judge except..." (Emphasis added)

[20] The question that therefore arises is this: was the relevant order in this case a final, or an interlocutory one?

[21] In **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1, for example, Brooks JA considered what would constitute an

interlocutory order as distinct from a final one. In so doing, at paragraph [9] of the judgment, he quoted the dictum of Lord Esher MR, in **Salaman v Warner and Others** [1891] 1 QB 734, at page 735, where Lord Esher expounded on the 'application test' which has been accepted as the proper test to be used to distinguish between interlocutory and final orders:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." (Per Lord Esher MR)

[22] The case of **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** is but one of several cases from this court outlining and approving this approach, using the application test. Another, for example, is that of **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, in which Morrison JA (as he then was) discussed the learning on the matter at paragraphs [13] to [24] of the judgment.

[23] In the instant case, had the application for relief from sanctions been granted, that would not have resulted in a final disposition of the matter, as it would then have proceeded to trial. Conversely, with the application for relief from sanctions having been refused, that would not have finally disposed of the matter, as an assessment of

damages would have been required. However, looked at from another perspective, it could also be viewed as a final determination in relation to liability alone.

[24] Applying the above principles stated in the case of **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited**, therefore, since the orders (in respect of which permission to appeal is being sought) would not have disposed of the matter in question either way, it leads to the conclusion that they are interlocutory in nature; and not final.

[25] However, the respondent's complaint that they have not been granted an opportunity to respond to the merits of the application is of no great significance. This is so because, as stipulated by rule 1.8(4) of the Court of Appeal Rules (CAR), notice need not be given to the respondents of the application for leave unless the court below or the single judge so directs.

[26] Section 11(1)(f) of JAJA proceeds to set out six exceptions where permission is not needed in order to appeal. However, none of those exceptions applies in the present circumstances and so permission to appeal is required. As such, the position taken by the respondents and stated at paragraph [11] hereof in relation to the validity of the notice of appeal as filed, is not without merit.

[27] Rule 1.8(9) of the Court of Appeal Rules (CAR) is also relevant, as it sets out the considerations for the court in determining whether it should grant an application for permission to appeal. The rule provides that:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success." (Emphasis added)

[28] The terms 'real' and 'realistic' were defined in **Swain v Hillman and another** [2001] 1 All ER 91, per Lord Woolf, at page 92 where he addressed the meaning of the phrase 'no real prospect' in the context of an application for a summary judgement. He opined that:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[29] Morrison JA (as he then was) in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A, observed at paragraph [21] of that judgment that this court has long accepted that the words "real chance of success" in rule 1.8(9) of the CAR were synonymous with the words "realistic prospect of success" used by Lord Woolf in the case of **Swain v Hillman** and so Lord Woolf's formulation was therefore applicable to the said rule 1.8(9).

[30] In the light of that, it is necessary briefly to consider what merit, if any, exists in the proposed appeal, limiting the discussion only to matters that are necessary to properly dispose of this application.

[31] The grounds of appeal put forward on behalf of the applicant in essence take issue with the learned judge's findings made pursuant to rule 26.8 of the Civil

Procedure Rules (CPR) in respect of his refusal of the application for relief from sanctions. They also question whether the application before Campbell J to strike out the applicant's statement of case or grant summary judgment was the same application that had gone before Sykes J. The complaints of the applicant that I will consider are directed at the learned judge's finding that: (i) it had not generally complied with the rules of court, (ii) the application for relief from sanctions was made 12 days before trial, that is on 26 May 2014; (iii) there is no explanation for the late filing of the application for relief from sanctions. I will also give brief consideration to the treatment of the respondents' application to strike out or for the grant of summary judgment by Campbell J.

[32] These, in summary form, were the learned judge's reasons for his decision: (i) although an explanation for the delay in complying with the case management orders was given, no reason was proffered for the delay in filing the application for relief; (ii) the applicant's conduct resulted in inordinate delay; (iii) the application for relief was not made promptly; (iv) there has been no general compliance with court orders by the applicant; and (v) the application for relief from sanctions was filed 12 days before trial.

[33] Against the background of these findings, it is necessary to give consideration to rule 26.8 of the CPR, which governs applications for relief from sanctions.

Rule 26.8 of the CPR

[34] Rule 26.8 of the CPR clearly states the considerations which govern the grant of relief from sanctions by the court. It states as set out below:

"(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that -

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[35] Below is my brief assessment of some of the more-important considerations stated above and the learned judge's treatment of the same.

A. *Promptness of application for relief*

[36] The trial of the claims in the court below was scheduled to commence on 26 May 2014. The notice of application seeking relief from sanctions was filed on 27 March 2014, and later amended and re-filed on 7 May 2014. The applicant's non-compliance with the case management orders would have commenced on 1 February 2014, and would have amounted to 55 days (or less than two months) when the application for relief from sanctions was filed. The non-compliance in respect of the witness statement commenced on 25 January 2014, which amounted to about 62 days (or a little over two months) to the filing of the application. I do not think that that period can reasonably be said to have amounted to inordinate delay. It would seem that the learned judge regarded the date of the amended application as the pertinent date and the appropriate point of departure in computing the period of delay. The amended application included grounds relating to the further amendment of the amended defence. However, although the time period would have negative implications for the impending trial date (by shortening the period available for preparation), I am unable to find that it was inordinate.

B. *Whether non compliance was intentional*

[37] The grounds in the amended application for relief from sanctions stated the following as the reason for the non compliance:

> "ii. That Ms. Stacia Pinnock Wright, Attorney-at-Law for the Defendant, in attempting to comply with the [case management] order took instructions and settled the List of Documents on January 24, 2014 and the Witness Statement

> and Witness Summary of the Defendant and filed the same on February 11 and 12, 2014 respectively.
>
> iii. That the failure to file the abovementioned documents within the time as specified in the Order was due to the fact that it took some time to locate the driver of the Defendant's motor vehicle. The said driver is no longer employed to the Defendant. An Investigator was retained to locate him and he was able to do so, enabling the signing of the Witness Statement.
>
> iv. The failure to file the said document within the time specified was not intentional or contumelious. Moreover, there is no prejudice to the Claimants.
>
> v....
>
> vi. The record indicates that the Defendants have to date complied with all the other orders of the Court in this matter."

[38] The leaned judge, at paragraph [21] of his written judgment, questioned whether the failure to comply was intentional but he made no finding in that regard. That issue was one of the critical considerations for the learned judge in deciding whether to grant relief from sanctions. In the light of the grounds of the application, which contend that the failure to comply was not intentional, the absence of such a finding may mean that there exists a real prospect of success in the appeal on that issue.

C. *Good explanation for failure*

[39] In the application for relief from sanctions, an explanation was offered for the failure to comply with the case management orders within the stipulated time. The failure to comply was attributed to the applicant being unable to locate Junior Bryan,

the driver of the vehicle at the time of the accident, as he was no longer an employee, servant or agent of the applicant. However, it seems apparent that the learned judge focused on the period of delay after the requisite documents were filed but before the application for relief from sanctions was made. It is, at the very least, debateable – even doubtful - whether this was a reasonable approach. A close reading of rule 26.8(2) shows that the "good explanation" that is required is of "the failure". That "failure" is also used there to mean the "failure to comply" with the order, which non-compliance resulted in the sanction taking effect. It will be remembered that the exact wording of rule 26.8(2) is as follows:

> "(2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure."

D. *General compliance*

[40] The learned judge lists, at paragraph [25], the circumstances he regarded as amounting to a lack of general compliance. He found that the affidavit in support of the application for relief did not conform with rule 30.2(e)(i) of the CPR, as it did not contain the name of the person on whose behalf it was filed and that, contrary to rule 30.4(1)(d), it did not contain the full name of the person before whom it was sworn. I, however, do not think that these factors, in the absence of other more-generalized instances of non-compliance, could have warranted a proper finding of a state of general non-compliance. Indeed, while not wishing, by any means, to appear to be

ignoring these requirements, it would seem to me that the instances of non-compliance are relatively minuscule in the scheme of things.

Had the same application been heard by Sykes J?

[41] In its proposed grounds of appeal, one contention of the applicant is that Campbell J incorrectly exercised his discretion by varying the order of Sykes J to strike out its statement of case. In her affidavit, filed on 3 November 2015, in support of the application for permission to appeal below, Mrs Denise Senior-Smith deposed that the learned judge erred in doing so as the respondents' application for striking out and/or for summary judgment had already been heard and determined on its merits by Sykes J, therefore there would have been no such application before Campbell J.

[42] On the other hand, the respondents, through the affidavit of Noel Green filed 18 January 2016, in opposing the applicant's application for leave to appeal below, had averred that the circumstances in which the respondents' application to strike out or grant summary judgment had proceeded, meant that the application had not been disposed of on its merits by Sykes J, which allowed it to be reheard by Campbell J. Mr Green deposed as follows:

> "3. I can remember clearly on the 27th day of March, 2014 that I was present in chambers before Mr. Justice Sykes, when our application to strike out the Defence for non-compliance with orders made at case management and for summary judgment were refused. On that date counsel for the Defendant indicated to the court in my presence that she had filed an application to abridge time to serve a notice of application for court orders seeking relief from

sanction and extension of time to comply with the case management conference orders. That notice was the notice of application for court orders seeking relief from sanction and extension of time to comply with the case management conference orders; which properly should have been heard in the round with ours. At that date neither the Notice of Application nor any related document was served on our Attorneys-at-Law and that application was treated by the judge as not before him. In the circumstances our application to strike out for non-compliance could not have been considered on its merits; the Defendant's application having been filed.

4....

5. I crave leave to refer to paragraph 17 of the said Affidavit of Mrs. Denise Senior Smith. At the hearing before Campbell J, our Attorney-at-Law, Mrs. Marvalyn Taylor-Wright supported her written submissions with oral submissions which were used before Sykes J, which sections were relevant to the proceedings before Mr. Justice Campbell. It was to that extent that our previous application was re-heard. No objection was taken by the Defendant's counsel and it was the case that our application to strike out was made in the context of the Defendants application to be relieved from sanction.

6. ...It was clear to all that the application before Mr. Justice Sykes was not being renewed in its entirety but that our firm position was that the sanction of striking out was to be imposed, the Defendant's application refused and the orders previously sought before Sykes J be granted in respect of the Defendant's admitted non-compliance with the court orders without or any proper justification.

7. In this regard, I am duly advised by my said Attorney-at-Law Mrs. Marvalyn Taylor- Wright and believe that, notwithstanding that she had filed no fresh application for such a sanction to be imposed by the court, the sanction of striking out was sought as the critical part of our vigorous opposition and defence to the Defendant's application for relief from sanction

> and to further amend its Defence so as to back track on previous allegations of fact which were inconsistent with the proposed further amended Defence. I clearly recall that the bundle filed and used before Mr. Justice Lennox Campbell contained both our previous application and the Defendant's application and our Attorneys-at-Law repeated reference to our application and the relief sought..."

[43] In the light of the above averments, it is important to give some consideration to the question of whether the respondents' application to strike out the applicant's statement of case or grant summary judgment could be regarded as having been heard on its merits before Sykes J; and, if so, whether that same application would properly have been before Campbell J.

[44] Relying on the affidavit evidence (including that of Noel Green), it would be difficult to find that the application before Sykes J was not addressed on its merits. I so conclude, as submissions were advanced before the learned judge, upon which a ruling was made (see, in particular, paragraph 5 of Noel Green's affidavit). As contended by the respondents, the mere filing of the applicant's application for relief from sanctions would not have operated to render any previous hearing of the application to strike out nugatory, unless the judge had adjourned the application to strike out without hearing it, for it to be considered with the application for relief. On the record of proceedings and minute of order he did not do so. It is to be remembered that Sykes J's first order made on 27 March 2014 was: "1. Application for striking out defence and in the alternative summary judgment is dismissed".

[45] Further, it is important to bear in mind, in this discussion, section 6(1) of the Judicature (Supreme Court) Act. That section provides as follows: "Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction". In light of this, if the application to strike out or grant summary judgment was considered on its merits, then the proper means to review the judge's refusal of the order sought would have been by way of an appeal of that decision. This would be another indication of the applicant's probable success at the hearing of any substantive appeal.

[46] In the event that I have wrongly concluded that there is a good argument for taking the view that the application to strike out or grant summary judgment was addressed on its merits before Sykes J, it is useful to address another consideration. While rule 26.3(1)(a) of the CPR gives the court power to strike out a statement of case where it appears that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings, there is a plethora of authorities that emphasize that striking out should be used only as a last resort and only where so warranted by the circumstances of the case. Thus, the particular circumstances of each case must be considered.

[47] In Campbell J's written judgment, his discussion addressed a consideration of rule 26.8 of the CPR, in relation to a grant of relief from sanctions. The learned judge, in explaining the sanction of striking out of a statement of case under the regime of the CPR, cited the dictum of Lord Woolf MR in **Biguzzi v Rank Leisure plc** [1999] 4 All ER

934, at page 940b, as considered by Brooks JA in **Business Ventures & Solutions Inc v Anthony Dennis Tharpe et al** [2012] JMCA Civ 49, which is to the effect that:

> "Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. **In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out**." [Emphasis supplied]

[48] Having cited the above dictum, Campbell J found that the circumstances were appropriate to warrant striking out. It must be borne in mind that the application to strike out the applicant's statement of case was grounded on the failure of the applicant to comply with case management orders, in particular to file and serve a witness statement and listing questionnaire within a stipulated time. Rule 29.11(1) of the CPR provides that:

> "Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."

[49] Rule 29.11(1) therefore imposes a sanction for the failure to serve the witness statement in the time limited to do so and this sanction takes effect unless relief from sanction is granted by the court. As such, striking out in those circumstances would not only be inappropriate; but, in my view, would operate as a second or double sanction.

[50] In any event, the costs order which had been imposed by Sykes J as a condition to the court hearing the applicant's application for relief from sanction, had been complied with. The failure to file the witness statement and listing questionnaire in time, although not to be condoned, in the absence of any other egregious failures, leads to the conclusion that other less-draconian and more appropriate sanctions could have been imposed, if the learned judge had thought it fit in the circumstances.

[51] I am not endeavouring definitively to resolve the competing contentions on this issue at this time. My intention is simply to demonstrate that on this issue also, the applicant has plausible arguments to deploy at any substantive hearing of its appeal and it's case cannot be said to be devoid of merit.

[52] I find that the above-highlighted issues show that there is merit in the appeal. It is my view that it has been sufficiently demonstrated that the applicant has a real chance of succeeding on the appeal.

Application for extension of time

[53] Rule 1.8(1) and (2) of the CAR stipulates that:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below."

[54] The applicant has satisfied the above condition in part, in that it applied for permission to appeal below within 14 days of the judgment being delivered, which application was refused. However, the applicant has fallen outside the 14-day period within which to make an application for leave to appeal to this court. (It is still necessary to apply to this court within 14 days of permission being refused even where permission was sought in the lower court within 14 days of the order below: see **Evanscourt Estate Company Limited v National Commercial Bank**, page 6). While a notice of procedural appeal was filed on 29 January 2016, by which the applicant had sought as its first order 'permission to appeal'; and that application was filed within the 14 days of the order for permission being refused, as demonstrated in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** SCCA No 54/1997, judgment delivered on 18 December 1998, at page 11, a notice of appeal filed without leave, where leave is first required, is invalid.

[55] Rule 1.7(2)(b) of the CAR, under the heading '[t]he court's general powers of management', empowers the court, except where the rules provide otherwise, to "extend or shorten time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".

[56] In **Leymon Strachan v The Gleaner Company Ltd and Stokes**, Motion No 12/1999, judgment delivered on 6 December 1999, Panton JA, (as he then was), at

page 20, addressed the approach to be taken by the court in considering an application for permission to appeal out of time. He said:

> "(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 [the] 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."

[57] The affidavit of Mrs Denise Senior-Smith seeks to address the factors under paragraph (3) above, which the court ought to consider in exercising its discretion. The relevant paragraphs of the affidavit state:

> "3. That a Notice of Procedural Appeal was filed on the 29th January, 2016...setting out as its first relief "Permission for leave to Appeal...
>
> ...
>
> 5. ..the relief was sought in the said Notice because I was of the belief that it would have been sufficient to include it in the said Notice not appreciating at the time that an interim Application had to be made separately from

> permission to appeal. That it is clear now having received the submissions of the Respondent that the step taken would not have been the appropriate step albeit the relief being sought is set out therein.
>
> 6. That the delay in filing a Notice of Application for Court Orders was due to my not sufficiently appreciating the procedure contained in the Rules and was of the mistaken belief that it could have been sought in the Notice of Appeal. That without a doubt if [sic] I humbly state that if I had properly interpreted the Rules I would have filed the Notice of Application for Court Orders within the time.
>
> 7. That prior to the filing of the Notice in this Honourable Court we sought leave in the Court below and did so within the time period as well.
>
> 8. That our conduct in this matter is not one that demonstrates that we deliberately misuse [sic] the time period allotted by the Rules of Court. The failure to comply was not intentional neither was it contumelious. I verily believe that the Respondents will not be prejudiced if an extension of time is granted.
>
> ...
>
> 14. That the Applicant has an Appeal that has a real prospect of success in that the Application to Strike out was already heard by the Honourable Mr. Justice Sykes and refused and an Unless Order granted as it relates to Costs against the Applicant."

E. *Length of delay and reason for the delay*

[58] The procedural blunder of counsel in these circumstances is regrettable, she not having appreciated that permission to appeal could not be sought in the notice of appeal. It may not be a sufficiently-good reason. However, as stated above, the court is not bound to refuse the application in the absence of a good reason, since the overriding principle is that justice be done. The delay in filing the application for extension of time for leave to appeal amounts to some eight months. However this

ought to be viewed in tandem with the filing of the procedural notice of appeal, which, albeit filed improperly, sought as its first order, leave to appeal. This application was filed within 14 days of the order below refusing leave. So that, when all these facts surrounding the delay are considered, the delay may not seem to be so egregious.

F. *The degree of prejudice to the other parties if time is extended*

[59] In my view, any prejudice to the respondents if the application for extension of time were to be granted would be minimal, as no argument or submission could reasonably be sustained that they have been taken unawares by the proposed appeal. The respondents, having objected to the grant of permission to appeal in the court below, were served with the notice of procedural appeal, which contained in it a request for permission to appeal, notwithstanding its contended nullity. Further, there was a costs order made in the court below in the respondents' favour which required compliance before the court would entertain any application from the applicant for relief from sanctions. It will be remembered that that order was complied with, and within the stipulated time.

G. *Arguable case for an appeal*

[60] Having passed the threshold of "real prospect of success", the test of arguability would also be satisfied.

Conclusion

[61] In the circumstances, it is my view that the justice of the case calls for the granting of the orders sought in the applicant's application. Although there have been

breaches of the rules and some delay on the part of the applicant, they are not so egregious as to warrant barring the applicant from having its day in court and having the substantive issues heard. Additionally, on the face of the pleadings, the applicant's case in the court below is an arguable one. I therefore propose that permission to appeal be granted as well as an extension of time within which to apply for permission to appeal. And, as this application has been necessitated by the applicant's default, I would propose that costs be awarded to the respondents to be agreed or taxed.

EDWARDS JA (AG)

[62] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion.

PHILLIPS JA

ORDER

1. The applicant is granted an extension of time within which to apply for permission to appeal.

2. Permission to appeal is granted.

3. The applicant is to file and serve its notice and grounds of appeal within 14 days of the date hereof.

4. Costs to the respondent to be agreed or taxed.