JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 26/2012

APPLICATION NO 80/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**MIRAGE ENTERTAINMENT LIMITED**	**APPLICANT**
AND	**FINANCIAL SECTOR ADJUSTMENT COMPANY LIMITED**	**1ST RESPONDENT**
AND	**FINANCIAL INSTITUTION SERVICES LIMITED**	**2ND RESPONDENT**
AND	**REFIN TRUST LIMITED**	**3RD RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION**	**4TH RESPONDENT**

Christopher Dunkley and Miss Jahyudah Barrett instructed by Phillipson Partners for the applicants

Miss Tamara Dickens instructed by Director of State Proceedings for the 1st, 2nd and 3rd respondents

10 and 25 November 2016

MORRISON P

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

F WILLIAMS JA

[2] I too have read the draft judgment of my sister P Williams JA and agree with her reasoning and conclusion.

P WILLIAMS JA

[3] This matter arises from a judgment of R Anderson J given on 20 January 2012. It is from this judgment that the facts, sufficient to give a background to this application, will be gleaned. In his decision the learned trial judge described the case as being another which arose out of the ferment or so called "meltdown of the financial sector" which occurred in Jamaica in the 1990's. Mirage Entertainment Limited, the applicant, was the operator of a night club in the Sovereign Centre complex in Liguanea, in the parish of Saint Andrew. It became indebted to Island Victoria Bank and Island Victoria Investments and Finance Limited. The indebtedness was ultimately assigned to the 4th respondent. The 1st, 2nd and 3rd respondents were companies set up by the Government of Jamaica to manage aspects of the rescue of certain financial institutions which had fallen into difficulties as a result of the financial crisis. The learned trial judge observed that for the purposes of the trial neither the 2nd nor the 4th respondents were relevant to the claim which had been brought.

[4] The applicant commenced the action in the Supreme Court in August of 2005 seeking to recover certain sums and damages which it claimed to be entitled arising out of the sale by the respondents in 1999 of its assets then located in the nightclub. The respondents maintained that in selling the assets, they were exercising their rights as creditors under the security documentation when the applicant, their debtor, was in

breach of its obligations there under. The learned trial judge denied the applicant his entire claim and gave judgment for the respondents. On 29 February 2012, the applicant filed its notice and grounds of appeal. On 18 March 2016, the appeal was struck out for want of prosecution.

[5] The copy of the record of proceedings, written judgment and notes of evidence relative to the appeal were received by the registry of this court from the supreme court on 27 June 2014. The requisite notice pursuant to rule 2.5.(1)(b)(ii) of the Court of Appeal Rules (the CAR) was dispatched to the attorneys-at-law by 2 July 2014 whereby they were advised of the availability of the documents relative to the appeal. The attorneys-at-law for the respondent acknowledge being served with a copy of the notice on 2 July 2014. The attorneys-at-law for the applicant does not challenge receipt of the notice.

[6] The skeleton arguments and chronology was then due on 23 July 2014 and the record of appeal due on 30 July 2014. Neither was filed by the dates due.

[7] A requisition form reminding the parties of the need to file the skeleton arguments and record was faxed to the attorneys-at-law on 12 August 2014 with another following on 19 September 2014. The latter was the registrar's reminder expressly reminding the applicant that if it intended to pursue this appeal, it should apply to a single judge of the court for an extension of time within which to file the relevant documents. The applicant was advised that failure to file skeleton arguments and the record of appeal and to make the appropriate application would result in the

appeal being dismissed for want of prosecution. The attorneys-at-law for the respondent acknowledge being served with the requisition form of 12 August 2014. The attorneys-at-law for the applicant again does not challenge receipt of either of these requisitions from the registrar.

[8] On 7 November 2014 a notice in default of filing documents and/or record was served on the applicant and it was advised that the failure to file the required documents would be formally reported to the court in the registrar's report on Friday 19 December 2014 at 9:30 am.

[9] On 18 December 2014 the applicant filed a notice of application for court orders seeking an extension of time for filing of the record of appeal and skeleton arguments. One of the grounds on which it relied in making the application was that the delay in bringing the appeal was occasioned by the applicant's "awaiting the Court's notes of evidence, which it is yet to receive".

[10] On 19 December 2014 when the matter came on for hearing before this court on the registrar's report/list with the recommendation that it be struck out for want of prosecution, the matter was adjourned sine die pending the determination of the notice of application for court orders for extension of time which had been filed the day before.

[11] On 26 March 2015 a single judge of this court granted the application for extension of time in the terms it had been sought namely:

> "Extension of time be granted for filing of Record of Appeal and Skeleton Arguments."

The applicant was advised on 21 April 2015 that the order was granted.

[12] There being no time stated within which the applicant was to file the documents, no step was taken by the registrar until 8 October 2015 when a letter was sent to the applicant's reminding that failure to file the said documents would again result in the appeal being referred to the court.

[13] On 23 December 2015, another notice in default of filing documents and/or record was served on the parties. The notice indicated the registrar's intention to report the applicant's failure to the court on 18 March 2016 at 9:30 am.

[14] On 11 March 2016, the respondents filed an application to strike out the appeal for want of prosecution and served it on the applicant on the same day. This application was supported by an affidavit of Kamau Ruddock detailing the chronology of the matter and urging that the matter be dismissed for want of prosecution. It was noted that the applicant had not provide any good explanation for the delay in filing the skeleton arguments and record of appeal. It was also urged that the respondents had suffered and would continue to suffer significant prejudice if this appeal was not struck out.

[15] On 17 March 2016, Mr Dunkley filed an affidavit on behalf of the applicant accepting that the chronology of events set out by Miss Ruddock was accurate. He went on to state:

> "... the responsibility for the delay in the prosecution of this appeal does not lie with the appellant, but with the attorneys-at-law who through inadvertence did not act in

accordance with the extension of time granted by this honourable court."

[16] On 18 March 2016, the matter was heard by this court and the following order made:

"Struck out for want of prosecution. Costs of the application to the respondent to be taxed if not agreed."

[17] On 12 April 2016 the applicant filed a notice of application for court orders seeking the following orders:

"1. That this Honourable Court restores Civil Appeal No. 26, of 2012 that was struck out on March 18, 2016

2. That a case management conference be fixed

3. No order as to costs

4. Such further or other relief as may be just."

[18] On 22 August 2016, the parties were served with a notice of hearing of application advising them that the application was set for hearing it the week commencing 7 November 2016. When it came on for hearing on 7 November 2016, it had to be adjourned due to the absence of Mr Dunkley who was engaged in a matter in the supreme court. No papers had been filed relative to the application up to that time.

[19] The grounds on which the applicant is seeking to have the matter restored are as follows:

"5. That the application is made pursuant to Rule 2.15 (a) of the Court of Appeal Rules.

6. That the failure to comply with the Court of Appeal's rules was not intentional.

7. That the failure to comply with the said rules can be remedied within a reasonable time .

8. That the principals have been before the this Honourable Court in two other (2) [sic] Appeals involving Homeletrix Limited which were both dismissed out on a technical point.

9. That the previous and unfortunate experience in the courts have also led to the hesitancy of this Appellant in prosecuting this appeal.

10. That restoring the appeal would not be prejudicial to the Respondents and would further the overriding objective.

11. That the Appellant at all material times remains committed to prosecuting this Appeal."

[20] This application is supported by an affidavit of George Hugh who describes himself as "a representative of the appellant". In effect he largely rehearsed what was given as the grounds for seeking the orders. He also relied on the affidavit of Mr Dunkley which had been filed on 17 March 2016 and which would have been considered by this court on the hearing of 18 March, when the order had been made to dismiss the appeal for want of prosecution.

[21] The applicant in seeking to have its appeal restored, urges this court to exercise its discretion as provided by rule 2.15(1) of the CAR which states that in addition to other powers given to the court it has "all the powers and duties of Supreme Court including in particular the powers set out in CPR Part 26" It is rule 26.8 of the CPR

that the applicant relies on in urging that this matter must be approached as one in which the applicant is seeking relief from sanctions.

[22] Although in the submissions made, the applicant only referred to rule 26.8(3) of the CPR, it is best to note the entire rule which provides:

> "26.8 (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

(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 cost in relation to any application for relief unless exceptional circumstance are shown.

[23] In choosing to focus on rule 26.8(3) in the submissions made on behalf of the applicant, Mr Dunkley did not deal with some of the matters which properly should be considered in approaching this application as one in which relief from sanction was being sought. One such matter is whether the application was made promptly. The appeal was struck out on March 18 2016. The application was filed on 12 April 2016. This was within three weeks and it may well be argued that given the history of this matter, this application was not made as promptly as one would expect.

[24] On the issue of whether the failure to comply was intentional, there is nothing expressed either by Mr Hugh or Mr Dunkley in their affidavits that can provide a satisfactory answer. Mr Hugh explained on one hand that the "previous and unfortunate experience in the courts have also led to the hesitancy of this appellant in prosecuting this appeal". He however then stated "that the appellant at all material times remains committed to prosecuting this appeal". These two statements are somewhat contradictory and causes the reasonable assumption that the applicant's failure to comply arose out of its hesitancy and thus was intentional.

[25] This then calls into question whether there is a good explanation for the failure. In effect the applicant has done nothing since filing the notice and grounds of appeal on 29 February 2012. There is no denial that the relevant notices issued by the

registrar were received. Despite this, the affidavit filed in support of notice of application to extend time to file the relevant documents, merely asserted that the delay in bringing the appeal was due to the awaiting notes of evidence. This was despite the registrar having issued the notice advising of the availability of the notes from 2 July 2014. Notably the applicant did not expressly indicate they had not received this notice.

[26] In any event, the applicant was fortunate to have convinced the single judge that the it should be granted an extension of time as requested. It could have considered itself even more fortunate that they were given no time within which to comply. Yet with this open-ended order, the applicant still did not make any effort to comply. The reason offered by the applicant was the often used excuse of the inadvertence of its attorney.

[27] As often as this excuse is used, is as often as this court has expressed its displeasure of having it being relied on. Indeed in **Anthony Powell v The Attorney General for Jamaica** [2014] JMCA Appeal 33, Panton P expressed it thus: at paragraph [8]:

> "In my view, the statement as to inadvertent neglect is one that has been overworked in these courts and ought to be given short shrift. Legal representation is a very serious matter, and there is no place for inadvertent neglect when the court has set firm timelines, especially often there what been earlier disregard of the rules and orders made under those rules."

[28] The bald assertion by Mr Dunkley is that the delay in the prosecution of this appeal "does not lie with the appellant, but with the Attorneys-at-Law who through

inadvertence did not act in accordance with the extension of time granted by this Honourable Court". This can hardly be regarded as anything close to an explanation and even less one that could be considered good. It did not find favour with court when considering whether to dismiss the appeal. It can hardly be expected that relying on the same affidavit with the same explanation when seeking to have the appeal restored would have a more favourable result.

[29] There remains one other matter that needs to be considered in these circumstances. The question of whether there is an arguable appeal was addressed by Mr Hugh and Mr Dunkley in their affidavits in the identical terms as follows:-

> "That on a reading of the judgment of His Lordship Mr. Justice Roy Anderson the irregularities of the government agents responsible for disposal of the appellant's assets ought to bear the scrutiny of appeal and which has a good prospect of success."

[30] In his submissions Mr Dunkley addressed the matter by making some statements in relation to the case which was presented by the applicant at trial. There is however no effort to demonstrate what errors in either fact or law the learned trial judge had made and thus has provided no basis on which the merits of the appeal could possibly be assessed.

[31] The applicant has urged that restoring the appeal would not be prejudicial to the respondents and would further the overriding objective. Miss Dickens for the respondents naturally submits otherwise. She points out that the respondent has been denied the fruits of their judgment for over four years and that to permit this appeal to re-commence in circumstances where the applicant is now seeking a case

management conference, suggesting even further delays, would not be in the best interest of furthering the overriding objective. She urges that there needs to be finality in these proceedings which has its genesis in the 1990's.

[32] Miss Dickens also raised a point which is worthy of consideration. She noted that the decision to dismiss the appeal for want of prosecutions was made by this court after the respondents' application for this order to be made had been heard. Further she submitted that the fact that an order for cost was made in favour of the respondents, supports the contention that this order was not merely on the recommendation of the registrar. Thus the question which she contends rightly arises is whether this matter should properly be entertained as an application for relief from sanction rather than as an appeal from the decision of this court on an application made and determined on its merits. This submission by Miss Dickens is a sound one.

[33] The conclusion therefore must be that this application is to be refused. There should also be costs awarded to the respondents to be taxed if not agreed.

MORRISON P

ORDER

Application refused. Costs to the respondents to be taxed if not agreed.