[2012] JMCA APP 39

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 4/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE MCINTOSH JA

BETWEEN	**CARLTON WILLIAMS**	**APPLICANT**
AND	**VEDA MILLER**	**RESPONDENT**

Jerome Spencer instructed by Nigel Jones and Company for the applicant

Garfield Haisley instructed by Page and Haisley for the respondent

12 June and 31 July 2012

HARRIS JA

[1] On 18 May 2010, a claim brought by the applicant against the respondent for the recovery of a debt of $3,000,000.00, with interest thereon, was dismissed by Glen Brown J. Judgment was given to the respondent on her counterclaim and costs were awarded to her.

[2] The applicant, wishing to appeal, having failed to file a notice of appeal within the time prescribed by rule 1.11(1)(c) of the Court of Appeal Rules ("CAR"), now seeks, by an application filed on 6 January 2012, an extension of time within which to do so. In an affidavit of Jason Jones in support of the application for extension of time, paragraph 3-6 states as follows:-

> "3. That the firm was retained in this matter some time before the court's vacation period with Mr. Nigel Jones himself having conduct of the matter. However, several incidents impacted on the preparation of the Notice of Appeal and compliance with the Court of Appeal Rules.
>
> 4. That during the later part of August to early September 2011 the firm relocated its office, and as a result of the relocation it took some time to readjust and to organize the matters.
>
> 5. That during the summer vacation and continuing into the relocation period the workload was continuously heavy.
>
> 6. That during the relocation of the office the file was misplaced and later found. That in an effort to prepare the case several files and extensive documents had to be reviewed by Mr. Nigel Jones

> in order to draft the Notice of Appeal."

An affidavit supporting the application was also filed by the applicant in which he states that he retained Messrs Nigel Jones and Company on 14 June 2011 and continually maintained an interest in the matter by making inquiries of Mr Jones as to its status.

[3] The applicant operated a fabric store up until 2003 when he ceased operation of his business. The respondent was a garment manufacturer. In 2004 the applicant disbursed funds to the respondent amounting to $3,000,000.00. He declared that this sum was a loan to the respondent. She, however, asserted that it was a gift to her.

Applicants' case

[4] The applicant stated that sometime in 2004, he was informed by a mutual friend of his and the respondent that the respondent's business encountered financial difficulties. After communicating with the respondent by telephone, they met, discussed the issue but he made no commitment to her. Sometime later, he went to her place of

business, conducted an examination of the affairs of the business, did research and made an assessment that "it [w]as a good investment opportunity". He asserted that he was satisfied that the business would be viable and that he would be repaid, so, he decided to give the respondent a loan. Following this, he gave her $2,000,000.00 on 27 May 2004 and $1,000,000.00 in July 2004. It was agreed that she would repay the loan at the rate of interest of 20% per annum. He declared that she gave him her assurance that the money would be repaid.

[5] The loan was to be secured by a mortgage on the respondent's property situated at 435 Perseus Close, Smokey Vale, Saint Andrew. The title was delivered to the applicant, but the respondent having failed to execute the mortgage deed, a caveat was lodged against the property by him.

[6] After receipt of the first disbursement, the applicant stated, the respondent commenced monthly repayments and continued making payments until 25 April 2005.

[7] In addition to the loan, the applicant related that he had given a personal undertaking to Ping's Fabrics for goods costing approximately $500,000.00 on the respondent's behalf in order for her to commence production. The respondent having failed to pay for the goods, he was obliged to honour his undertaking.

[8] Subsequently, it came to his attention that the respondent had acquired a business called "Fashion Café", of which he became a shareholder. His acquisition of the shares in "Fashion Café" was based on an agreement that she would repay him the amount at a monthly rate of interest of 20% and after full repayment was made, the shares would be transferred to her.

[9] He stated that he was never actively engaged in the operation of the "Fashion Café". However, he asserted that he learnt that the respondent had used the money which he had loaned her to purchase that business. On making inquiry of her concerning the funds for the acquisition of the business, she informed him that she was a friend of the vendors and the landlord which proved to be false.

[10] He said that by this time her overtures to him became evident, leading to their engagement in a few covert sexual encounters.

Respondent's Case

[11] It was the respondent's evidence that she met the applicant in December 2002, and purchased material from his establishment in the operation of her business, Softees Limited which manufactured garments.

[12] In or about June 2003, the respondent asserted, the appellant began to court her, following which they became engaged in an intimate relationship towards the end of 2003. This relationship ended in June 2005.

[13] Between 2003 and 2004 the respondent suffered financial hardship consequent upon the death of her husband and the applicant began providing for her financially and promised to assist her "in getting back on her feet".

[14] In or about February 2004 the respondent said she discovered that "Fashion Café" was for sale and discussed the question of the acquisition of the business with the applicant. Approximately two

weeks later, the respondent stated, the applicant informed her that he would assist her in acquiring the business as it was in a "prime location". On 27 May 2004, he gave her a cheque for $2,000,000.00 which she used to purchase the business. On 1 June 2004, she commenced operation of the business and on 1 July 2004, she received a further cheque for $1,000,000.00 from him to purchase stock for it. She declared that, from the $1,000,000.00, she applied $154,000.00 towards two months security deposit on the rental of the premises and $801,506.00 to buy liquor, the purchase of which was made through the applicant.

[15] In August 2004, the applicant expressed a desire to become more involved in the business and on 19 August 2004, the business was incorporated as a limited liability company under the name "Cashville Fashion Café", in which they were shareholders and directors.

[16] The respondent further related that the $3,000,000.00 given to her by the applicant was a gift and not a loan.

[17] It was also her evidence that she had delivered her certificate of title to the applicant for him to have the death of her husband recorded thereon, not a mortgage. She denied that she was requested to sign any document in respect of a mortgage.

The proceedings

[18] The applicant, having made demands on the respondent for the money, to which he received no response, initiated proceedings against her for the recovery of the money, claiming it to have been a loan.

[19] In a defence and counter claim filed by the respondent, she averred that the money was an advance or a gift and not a loan and sought to rely on the presumption of advancement, or alternatively that the parties were "partners in a joint venture" and that they were "co-venturer[s] with risk capital at stake". In her counter-claim she sought a declaration that the caveat on her certificate of title had been lodged unjustifiably and an order for its removal as well as damages.

[20] The following orders were made by the learned judge:

> "The claimant's claim is therefore dismissed and judgment entered for the defendant on the claim and counter claim with costs to be agreed or taxed. The caveat lodged against the defendant's certificate of title registered at Volume 1401 Folio 464 to be removed and the registered duplicate certificate of title registered at Volume 1095 Folio 195 in his possession to be surrendered to the Registrar of Title."

Submissions

[21] Mr Spencer, acknowledged that a notice of appeal should have been filed by 29 June 2011 and in seeking the court's leave to file the document, first made reference to the case of **Jamaica Public Service Company Ltd v Samuels** [2010] JMCA App 23. In that case, Morrison JA, cited with approval the legal position with respect to an extension of time for non compliance with the rules, as enunciated by Panton JA, (as he then was), in **Strachan v Gleaner Company Ltd** and **Stokes**, Motion 12/1999 delivered 6 December 1999. This Panton JA expressed to be that:

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

[22] It was submitted by Mr Spencer that, having regard to the interplay between rule 1.1(1)(10) of the CAR and rule 3.5 of the Civil Procedure Rules ("CPR") the period during the legal vacation, between 31 July and 16 September 2011 should be discounted in computing the time for filing the notice of appeal. The period of delay is approximately five months which is not inordinate, he argued, citing **CVM Television Ltd v Tewarie**, SCCA 46/2003 delivered 11 May 2005 in aid of this submission. He further

submitted that counsel's error in not filing the notice of appeal in time was bona fide, accordingly, in the interest of justice, the court should afford some indulgence to the applicant, citing **Williams v Attorney-General** [1987] 24 JLR 334 in support of this submission.

[23] It was further submitted by Mr Spencer that in **Wilbert Christopher v Helene Coley Nicholson** [2011] JMCA App 23 this court paid due regard to a dictum in **Strachan v The Gleaner Company Limited** when Morrison JA said:

> "…this court held that on an application for extension of time to file an appeal, the applicant will generally be expected to show (i) some satisfactory reason for the delay, and (ii) that there is some substance in the intended appeal."

[24] It was also argued by counsel that the applicant has a real chance of success in an appeal. In his written submissions, after making reference to a statement by Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 that "if Dr Ghosh had any merits which were worthy of consideration, we could certainly extend the time", counsel submitted that by this statement, it is apparent that the merits of the case are of paramount interest. In his

supplemental written submissions he pointed out some of the error of the learned judge, which are as follows:

> "6. In the present case, it is our submission that the Learned Judge's findings of fact in the court below above [sic] are amenable to being successfully challenged in the Court of Appeal. The Learned Judge's reasons for judgment revealed:
>
> a. a misunderstanding of the pleadings and evidence adduced; and
> b. the acceptance of the highly improbable evidence of the Respondent on material points as opposed to the evidence of the Appellant.
>
> 7. The following areas are but a few of the aspects of the judgment which suffice to show the existence of an arguable case on appeal with real prospects of success:
>
> (1) At paragraph 19 of the judgment, the Learned Trial Judge said:
>
> "**It was also a fundamental term of the contract that the Defendant had agreed to pay him interest at <u>the rate of 20% monthly</u>**. He asserted that the [sic] she made eight payments as interest. **<u>However these payments were less than</u>**

the amount he said they agreed. (emphasis ours)"

The judge's assessment of the evidence however is incorrect as it was no part of the Appellant's evidence in chief nor pleadings that the Respondent was to pay him interest at the rate of 20% monthly. **The Appellant's evidence was that in relation to the $2 million loaned on May 27, 2004, that amount was to be repaid at 20% per annum**. Further, the Appellant gave no evidence on how (whether weekly or monthly, for example) the repayment of the loan was to be made but simply that it was to repaid within a year. **The Appellant's reference to repayment of money at the rate of 20% percent monthly related to a sum not claimed, namely the amount the Appellant paid to Pings Fabric on behalf of the Respondent**.

(2) At paragraph 19 [of] the Reasons for Judgment, the Learned Trial Judge also said:

"**In addition there were two payments amounting to $505,600.00 that was not accounted for by him**. The Defendant on the other hand explained that these sums were reimbursements for the liquor he had purchased for

the business. (emphasis ours)"

Firstly, it is incorrect that the Appellant did not account for the payments of $505,600.00, which were made on May 28 and June 29, 2004. **The Appellant's evidence was that after he made the payment to the Defendant on May 27, 2004, the Defendant immediately commenced repayment of the loan**. This explanation should be juxtaposed against the Respondent's explanation of the said payment, namely that it was reimbursement for liquor bought by the Appellant.

This explanation is dubious to say the least as on the Respondent's own case the agreement regarding reimbursement of liquor was made sometime **after those two payments were made to the Appellant**, as was acknowledged by the Learned Trial Judge at paragraph 15 of the Reasons For Judgment. **Put another way, the Respondent's evidence was that she started repaying the Appellant for liquor purchased before the Appellant had even agreed to purchase liquor for her**!

(3) The Respondent's evidence was that she made several payments to the Appellant

> on account of the agreement to reimburse in relation to liquor he purchased **during the life of the business**. The last such payment was made on **April 29, 2005** even though the business on the Respondent's evidence came to an end by **December 2004 when repairs were undertaken by the landlord, who [on] her account, rented the premises to someone else after the repairs were completed**."

[25] It was further argued by counsel, that there is no evidence from the respondent that she would be prejudiced should the applicant be successful. Despite this, he argued, any prejudice suffered by the respondent would have been as a result of her failure to remove the caveat consequent on the order of the court, as well as her neglect in not having her costs taxed.

[26] Mr Haisley, in response, submitted that a delay of five months was inordinate and cited the case of **Arawak Woodworking Establishment Ltd v J.D B Ltd** [2010] JMCA App 6 in bolstering his submission. In **Salter Rex & Co v Ghosh** the period of delay was four weeks, which was not inordinate. It was further contended by

him that in **CVM Television v Tewarie** the application was for an extension of time to file skeleton arguments.

[27] The explanations advanced by the applicant for the inordinate delay are woefully unsatisfactory and lack merit, having regard to the fact that the new attorney-at-law was retained on 14 June 2011, 15 days prior to the expiration of the time for filing the notice of appeal, he argued. He went on to argue that if the new attorney's workload was so heavy as to prevent his dealing expeditiously with the appeal he ought not to have taken on the matter, and further, the misplaced file could have been easily reconstructed as the matter was uncomplicated.

[28] Mr Haisley, although recognizing that there were discrepancies and inconsistencies in the evidence of both parties, submitted that the discrepancies and inconsistencies in the statements of the applicant were far more significant in contrast to those of the respondent and that the learned judge, in exercising his discretion, weighed up and balanced them in a proper manner. In his written submission, counsel pointed out a number of inconsistent and

discrepant statements made by the applicant, which he stated to be as follows:

> "In his evidence the Applicant indicated that his reason for giving the Respondent an additional one million dollars was because he was told by her that she needed the money as a matter of urgency to pay for some materials and that she was being evicted from the business place. However, in his affidavit to the Registrar of Titles on which he relied in applying for a caveat on the Respondent's certificate of title he indicated that his reason for advancing the additional one million dollars was because the Respondent advised him that she had committed herself to a business venture and that there existed a shortfall of one million dollars (page 3, paragraph 4 of judgment).
>
> In one instance the Applicant gave the impression he had found out the Respondent had purchased Fashion Café sometime prior to the 27th of July 2004 and in another instance it would have been after April 2005 (page 5, paragraph 6 of judgment).
>
> The term of the alleged loan set out in two demand letters sent to the Respondent by the Applicant's then attorney-at-law was one year while in his evidence the Applicant stated that the loan was for a period of two years. What was stated by the Applicant in his evidence and what was stated in the demand letters was also at variance with what was stated in the Applicant's affidavit to the Registrar of

Titles in which he said it was a term of the agreement that the Respondent would sell the property at the end of 2004 and repay the debt in full (page 6 of witness statement).

The demand letters made reference to a single loan of $3,000,000.00, while the Applicant's evidence was that there was an initial loan of $2,000,000.00 followed by a further loan of $1,000,000.00 on a later date (page 6 of judgment).

The demand letters stated that the Respondent had made no payments on the loan while the Applicant in his evidence alleged that eight payments made to him by Respondent constituted repayment of the loan (page 7 of judgment).

In Applicant's affidavit to Registrar of Titles he alleged that the Respondent showed him a valuation of the property prepared by Allison Pitter & Co., but it was suggested to the Respondent on cross examination that it was the Applicant's attorney that had the valuation done (page 8 of judgment).

The Applicant denied that he and the Respondent were business partners in Fashion Café notwithstanding the fact that he was a shareholder and a director in the company and had executed a credit card merchant agreement to obtain a credit card machine for the business (page 10 of judgment).

The Applicant gave no explanation as to why the Respondent gave him back $265,506.00 the day after he gave her the cheque for $2,000,000.00 and gave him the sum

> $240,000.00 upon receiving the cheque for $1,000,000.00 (page 12 of judgment).
>
> Though the Applicant alleged that it was a term of the agreement that the Respondent would pay interest at 20% per annum, none of the payments made by the Respondent to the Applicant was consistent with such a term (page 12 of judgment)."

Analysis

[29] Rule 1.7(2)(b) of the CAR accords the court discretionary powers to grant an extension of time to carry out a procedural step or do an act. Ordinarily, the adherence to the rules of court is a prerequisite for the timely disposal of cases. In order to justify the grant of an extension of time, there must be some material to facilitate the court in the exercise of its discretion. In considering an application for an enlargement of time this should be done within the context of the relevant rule, bearing in mind the overriding objective. Since the advent of the CPR, the English authorities suggest that, in the application of the new rules, consideration should be given without recourse to case law under the former rules. However, neither the CAR nor the CPR specifies the factors to be taken into account on an application for an enlargement of time.

Despite this, there must be some criteria to afford the court guidance in the exercise of its discretion. Accordingly, no violence would be done if the court employs such elements as propounded by Panton JA (as he then was) in **Strachan v The Gleaner Company Ltd and Stokes** in its deliberation.

[30] In the present case, the length of the delay and the reason for the delay in seeking to appeal are relevant. Equally important is the fact that the default as to time is with reference to the applicant's endeavour to appeal against the merits of the case. The question of prejudice should also be considered.

[31] The length of the delay and the reason therefor will first be addressed. It is common ground that the appellant had failed to file an appeal within the time prescribed by rule 1.11(1)(c) of the CAR. Five months have elapsed since the permitted time for appealing. In **Jamaica Public Service Co v Samuels**, the appellant was two months out of time in filing the appeal and an order permitting it to appeal was made. This obviously shows that the two months delay was not considered inordinate. In contrast, in this case, the time

lapse is five months. In **CVM Television v Tewarie**, time was extended to file and serve skeleton arguments, notwithstanding the appellant's delay of one year and two months. Admittedly, **CVM's** breach was its delay in filing skeleton arguments while that of the applicant at bar relates to the filing of a notice of appeal. However, there can be no gainsaying that both transgressions offended the rules of court. Remarkably, a breach existed in each case whether it relates to skeleton arguments or a notice of appeal. However, it is of import to say that, although not departing from the court's right to take into consideration the length of delay in complying with a rule for extension of time, the recent cases show that the focus of the court is the reasons proffered for the delay and the merits of the proposed appeal -see **Jamaica Public Service Co v Samuels** and **Hashtroodi v Hancock** [2004] 3 ALL ER 530.

[32] The reason for the failure of the applicant to comply within the requisite time is highly material. Some reason for the delay must be advanced. Even in the absence of a good reason, the court may nonetheless grant an extension, if the interests of justice so requires. In **CVM Television v Tewarie** the appellant advanced a

reason for the delay which was not considered "altogether adequate", but was treated as not "entirely nugatory". In **Williams v The Attorney-General**, a notice of appeal was filed in relation to an interlocutory order made in the court below, without the requisite leave being granted for appealing. Although the time for appealing lapsed, leave to appeal was granted. The reason proffered for the tardiness was a mistake on the part of the attorney-at-law for the appellant and the misplacement of the file in the Registry of the Supreme Court. In **Arawak Woodworking Establishment Limited v Jamaica Development Bank Limited**, an application for enlargement of time to appeal was refused because the applicant, having been granted leave to appeal by the Master, failed to do so within the prescribed time and delayed for a period of 54 days before seeking an extension of time, despite reminders by the registrar of the court of appeal. No reason was advanced for the delay. In addition, the proposed appeal was considered unmeritorious.

[33] It is true, as Mr Haisley submitted, that the applicant's attorney-at-law was seized of the matter 15 days prior to the

expiration of the time for appealing and could have acted then. However, he did not. There being a delay, a reason or reasons must be put forward for it. It cannot be said that some reason had not been given for the delay. The fact that the heavy workload of the attorney-at-law prevented him from pursuing an appeal in a timely manner and the matter of the misplaced file due to the attorney's relocation are acceptable as plausible explanations for the applicant's tardiness in the pursuit of an appeal.

[34] I now turn to the merits of the appeal. The learned judge stated that "the thrust of the claimant's [claim] was based on the doctrine of part performance as he was claiming an equitable mortgage and the duplicate certificate of title was deposited with him." There are no averments in the applicant's pleadings indicating that the applicant's claim was grounded on an equitable mortgage. The claim form was couched in the following terms:

> "The claimant, Carlton Williams, Retired Businessman of 3 Norbrook Way, Kingston 8 in the parish of Saint Andrew claims against the Defendant, Veda Miller of 23 Stars Way, Hughenden, Kingston 20 in the parish of Saint Andrew for breach of contract arising from the

failure on the part of the Defendant to repay loan in the sum of Three Million Dollars.

Amount Claimed	$3,000,000.00
Together with interest from 29/04/05 to 01/03/08	$1,704,657.53
(Daily rate since today= $1,643.84.00 per day) & continuing Court Fees	$ 2,000.00
Attorney's Fixed Costs on issue	$ 10,000.00
Total Amount claimed	**$4,716,657.53**"

[35] It is immediately perceptible from the claim that the applicant sought to recover the sum of $3,000,000.00 as money due and owing to him arising from a loan given by him to the respondent with interest thereon. Additionally, the particulars of claim essentially speak to a loan from the applicant to the respondent. Paragraphs seven and eight of the particulars of claim, although making reference to the delivery by the respondent of her title to the applicant for the purpose of registering a mortgage thereon and that a caveat was lodged, the averments make it clear that the registration of the mortgage related to securing the loan. In dealing with that which he considered a claim in equity, the learned judge spent some time addressing the matter of part performance.

Arguably, the applicant's claim relates to the recovery of a debt, not a claim in equity based on the doctrine of part performance.

[36] In dealing with the question of the payment of interest, the learned judge at paragraph 16 of his judgment stated that:

> "16. It was the claimant's evidence that the interest was to be calculated at 20% per annum i.e. $50,000,00 per month until the loan was repaid. The interest for the first month would be calculated on the principal of $2,000,000.00 and thereafter on $3,000,000.00 until the loan was repaid. The first payment should be approximately $34,000.00 and thereafter $50,000.00 monthly. Interestingly, there was no cheque that showed the defendant paid to the claimant any sum calculated at 20% as claimed by him. Instead seven cheques each in the sum of $40,000.00 and the eighth for $16,000.00 payable to the claimant were exhibited. There was no evidence that he ever complained or protested that the defendant was not paying less than the agreed interest. Likewise there was no claim for arrears of interest notwithstanding that she only made 8 payments totaling $216,000.00."

However, at paragraph 19, after stating that the applicant was not candid with the court he went on to make the following finding:

> "… The onus was on him to establish on a balance of probability that parties had a contract. He had alleged that the defendant would repay the $3,000,000.00 at the end of two years. However his previous statements showed three different periods. It was also a fundamental term of the contract that the defendant had agreed to pay him interest at the rate of 20% monthly. He asserted that she made eight payments as interest. However these payments were less than the amount he said that they had agreed. In addition there were two payments amounting to $505,600.00 that was not accounted for by him. The defendant on the other hand explained that these sums were reimbursements for the liquor he had purchased for the business."

[37] Despite the learned judge making reference to the applicant's evidence of the repayment of the alleged loan at 20% per annum he went on to misquote the evidence. There was no evidence of an agreement for the respondent to pay interest at the rate of 20% monthly on the alleged loan. The applicant's evidence was that she was required to pay interest of 20% annually.

[38] There was also in evidence two cheques drawn by the respondent in favour of the applicant, one for $265,506.00 dated 28 May 2004 and the other for $240,000.00 dated 29 June 2004.

The learned judge, in dealing with these two amounts found that the applicant failed to account for them. The applicant had in fact stated in his evidence that the payments were made by the respondent on account of the loan, immediately after he made payments to her. The learned judge found that these sums were reimbursement to the applicant which the respondent said was in respect of liquor bought by him. Notably, the respondent stated that she commenced operation of Fashion Café on 1 June 2004. The lease for Fashion Cafe was executed on 16 June, 2004. There is no evidence that she was let into possession of the restaurant prior to the execution of the lease. Additionally, Cashville Fashion Café was incorporated on 18 August 2004. Remarkably, the cheque for $265,506.00 paid to the applicant predates 1 and 16 June 2004 and the incorporation of the company. Importantly, it was the respondent's evidence that:

> " It was agreed between the claimant and me that he would purchase all the alcohol for the business as he had a friend who operated a liquor store and that I should reimburse him for same out of the One Million Dollars ($1,000,000.00) given to me on the 1st of July 2004. As a result, throughout the life of the business I wrote eight cheques to the Claimant totaling Eight Hundred and One

> Hundred Thousand, Five Hundred and Six Dollars ($801,506.00).”

Would it be correct to say, as found by the learned judge, that the $505,600.00 related to reimbursement to the applicant for purchase of liquor for the business?

[39] Further, the respondent, as her defence, raised the issue of a presumption of an advancement relating to the $3,000,000.00 which she stated was given to her by the applicant. She also pleaded in the alternative that the applicant and her, as co-venturers, there was a risk at stake. It could be argued that the evidence does not accord with the principles governing a presumption of an advancement nor is it sufficient to support the alternative plea.

[40] So far as the question of prejudice is concerned, as Mr Spencer rightly stated, any prejudice which the respondent may suffer is as a result of her own neglect.

[41] In my view the applicant has a good appeal as the foregoing raises arguable issues which ought to be resolved by the court.

[42] The applicant ought to be permitted to file a notice of appeal and the time for so doing should be extended to 14 days from the date hereof.

DUKHARAN JA

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

MCINTOSH JA

[44] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

It is ordered that the applicant shall have leave to file a notice of appeal and the time to do so is extended to 14 days from the date hereof. Costs to the respondent to be agreed or taxed.