

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 46/2003

IN CHAMBERS

CASE MANAGEMENT CONFERENCE

BETWEEN:	CVM TELEVISION LTD	APPELLANT
AND	FABIAN TEWARIE	RESPONDENT

May 10 & 11, 2005

APPLICATION FOR EXTENSION OF TIME TO FILE SKELLETON ARGUMENTS

**Mr. Winston Spaulding, Q.C., Mr. Jeffrey Daley & Mrs Jean Barnes
instructed by Blackridge & Covington for appellant**

**Mr. Earl Witter & Mr. Maurice Frankson instructed by Gaynair & Fraser for
respondent**

P. HARRISON, J.A:

This is an application for court orders by the respondent dated May 10, 2005, seeking an order that:

- (a) the time for filing and serving the respondent's skeleton arguments be extended to the date hereof, and
- (b) the costs of the application be cost in the claim.

The appellant filed a notice of preliminary objection thereto and also an application for court orders each dated May 5, 2005.

Learned Queen's Counsel for the appellant advanced his preliminary objection that the respondent being in breach of rule 2.6(2) of the Court of Appeal Rules, by not filing its skeleton arguments within the prescribed time, and having delayed for one year and two months should not be heard on this application. This Court was not inclined to that view. Counsel agreed that the respondent's application be proceeded with.

The facts relevant to this matter are that on May 29, 2003, a judgment was handed down by D. McIntosh, J sitting with a jury, awarding to the respondent, damages for libel in the sum of \$20,800,000.00 and costs of \$150,000.00. On that date a stay of execution of the judgment was granted for 14 days and extended for a further 14 days on June 12, 2003.

Notice and grounds of appeal were filed by the appellant on June 12, 2003.

On June 25, 2003, an application for a further stay of execution was refused by the Court which, on July 28, 2003, by the consent of the parties, varied its order. As a consequence the appellant paid to the respondent the sum of \$3,170,000.00 and provided a guarantee for payment of the sum of \$17,800,000.00, the balance of the judgment debt.

Mr Witter for the respondent advised the Court that the skeleton arguments, were belatedly submitted and served on May 9, 2005. He

referred to an affidavit of attorney-at-law Maurice Frankson dated May 9, 2005, and argued that the reason for the delay was "... due to oversight ... and a heavy workload ..." that no disrespect was intended, no prejudice was occasioned to the appellant, and that there was no power to debar a party from being heard on appeal.

The respondent had a real prospect of succeeding on appeal and in view of the indulgence and forbearance afforded the appellant by the respondent in the past it would be unconscionable to debar the respondent. Relying on a text, ***A Practical Approach to Civil Procedure by Stuart Sime, 5th edition (2002)*** and ***Finnegan v Parkside Health Authority*** [1998] 1WLR 411, he submitted that despite the delay the Court should consider the reasons given and the overriding objective of the Rules, and grant the extension of time. He conceded that an appropriate sanction was the ordering of costs of the application.

Mr Spaulding, Q.C., for the appellant argued that the delay was extreme and portrayed a defiant disregard for the Rules and the Court. The reasons advanced were insufficient and the course of conduct of the respondent was prejudicial to the appellant, an abuse of process and a reluctance to bring the appeal to a conclusion.

The appellant had made payments to the respondent and was prejudiced by the deliberate delay of the respondent, which the Court in its inherent power and by the Rules, should prevent by striking out the

respondent's skeleton argument and debar him continuing in the appeal. He relied on ***Grovit et al v Doctor et al*** [1997] 2 All ER 417 and ***Hunter v Chief Constable of West Midlands*** [1981] 3 All ER 727.

Rule 2.6(2) of the Court of Appeal Rules 2003 ("the Rules") requires a respondent who wishes to be heard in an appeal, within 21 days of service of the appellant's skeleton arguments:

"... (to) file his or her skeleton arguments and serve a copy on all other parties."

The wording of the rule seems to suggest that non-compliance will result in the "sanction" that the respondent will not be allowed to advance any arguments in the appeal.

Rule 2.15 of the Rules recites the powers of the Court. It reads:

"2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –

(a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; ..."

Rule 26.7(2) of the Civil Procedure Rules, reads:

"(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanctions ..."

The Court's power to grant relief is provided in Rule 26.8. It reads:

- “26.8 (1) An application for relief from any orders and sanctions 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.” (Emphasis added)

The factors which the Court should also take into consideration are outlined, inter alia, in Rule 26.8(3). It reads:

- “(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.” (Emphasis added)

This Court may exercise its wide powers as given by the Rules to deal with non-compliance, generally. Rule 1.7(2)(b) reads:

- “(2) Except where these Rules provide otherwise, the court may –
- (a) consolidate appeals;
 - (b) extend or shorten the 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.”

and in special circumstances “... may dispense with compliance with any of these Rules” (Rule 1.7(8)).

This Rule 1.7(2)(b) is alike Order 3 r 3.5 (UK). The latter was considered in the case of ***Finnegan v Parkside Health Authority*** [1998] 1WLR 411 which concerned a notice of appeal against dismissal of the plaintiff’s claim for want of prosecution filed out of time. In allowing the appeal the court took the view that the:

“... mechanistic approach was inappropriate ... dismissal did not follow ... failure to show good reason for procedural fault.”

Courts do make a distinction in respect of its approach to applications for extension of time to remedy procedural default under the new Rules. The overriding objective to deal with cases justly (Rule 1.1 of the CPR) must be given effect to by this Court in the exercise of any discretion or the interpretation of any rule (Rule 1.2). The aim of dealing fairly with the parties, avoiding prejudice, saving expense and proceeding with expedition, are some of the factors which must be considered by a court in the exercise of such a discretion.

In the instant case, although the reason given for the delay, namely: "... due to oversight and the heavy work schedule" ... was good but not altogether adequate, it is not entirely nugatory. The delay was not that of the respondent. The interest of the respondent not to be excluded from the appeal process due to the fault of his counsel, is an aspect of doing justice between the parties.

The delay being significant may have created some prejudice to the appellant. However, an expedited date of hearing of this appeal is a helpful cure.

The respondent in the instant case has complied with the other procedural steps and has sought to remedy his non-compliance with respect to the filing of his skeleton arguments. One can therefore properly say that "... the party in default has generally complied with all other relevant rules ..." (Rule 26.8(2)(c)).

Consequently, the application for extension of time to file the skeleton arguments is extended to permit such filing within two (2) days of today's date. Any response thereto by the appellant is to be effected within twenty-one (21) days of service.

Costs of this application are to be the appellant's, and are to be paid forthwith.

Application of the appellant for court orders and preliminary objections are dismissed with no order as to costs.