JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00088

APPLICATION NOS COA2024APP00169 & COA2024APP00182

BETWEEN CARIBBEAN CEMENT COMPANY LIMITED APPELLANT

AND MATTHEW TARAWALI RESPONDENT

Charles Piper KC instructed by Charles Piper & Associates for the appellant

Dr Lloyd Barnett and Ms Tavia Dunn instructed by Nunes, Scholefield, DeLeon & Co for the respondent

27 and 31 January 2025

Civil practice and procedure - Application to strike out appeal for non-compliance with rules - Application to extend time for serving a notice of appeal - Whether there was a good reason for delay in the service of the notice of appeal - Whether there is an arguable appeal - Whether trial judge erred in finding that claim was not statute-barred - Whether trial judge erred in the interpretation of rules governing a pension scheme - Court of Appeal Rules, rules 1.7(2)(b) and 2.14(a)

ORAL JUDGMENT

STRAW JA

[1] Before the court are two applications: the respondent's application to strike out the appeal filed on 10 July 2024 and the appellant's application for an extension of time to serve the notice of appeal on the respondent filed on 29 July 2024.

[2] The judgment giving rise to the appeal was delivered on 2 October 2023. By that judgment, Jackson-Haisley J, the learned judge, gave judgment in favour of the

respondent, Mr Matthew Tarawali, against his former employer, the appellant, Caribbean Cement Company Limited ('Caribbean Cement').

[3] Between 1996 and 2002, Mr Tarawali was employed as an operations manager at Caribbean Cement. He resigned effective 10 October 2002. He requested his pension refund in 2018, when he would have officially retired. The learned judge declared that Mr Tarawali was entitled to the benefit of the Caribbean Cement Company Limited Life Assurance and Pension Scheme ('the Pension Scheme') and ordered that Caribbean Cement pay all the benefits and entitlements that were found to be due to him under the scheme.

[4] In finding in Mr Tarawali's favour, the learned judge found that as he did not elect to continue to make contributions toward the pension scheme upon his resignation, or indicate that he wished to surrender his benefits for cash, he automatically elected to take his pension, upon attaining the age of retirement. Further, having not become aware of the refusal of his claim until September 2018, he could not have been expected to bring an action earlier. Therefore, his claim was not statute-barred. In determining the facts of the case, particularly, whether the benefit was in fact paid to Mr Tarawali as contended by Caribbean Cement, the learned judge indicated that on a balance of probabilities, she accepted his evidence that he did not request his pension cheque in 2002 and neither did he instruct his wife to collect any cheque on his behalf. She found further that Mr Tarawali proved that no cheque had been lodged into his account at the National Commercial Bank.

[5] On 14 November 2023, a notice of appeal was filed on behalf of Caribbean Cement. However, it was not served on Mr Tarawali's attorneys until 30 April 2024. By his affidavit filed in support of his application to strike out the appeal Mr Tarawali deposed that by letters dated 30 November 2023, 15 January 2024 and 16 April 2024, his attorneys wrote to the attorneys for Caribbean Cement indicating that they were not served with a notice of appeal. By the latter two letters, inquiries were made as to whether an application for

extension of time would be made and further advising that having not received any response to the prior letters, steps would be taken to facilitate realisation of the judgment.

[6] By its application for extension of time to serve the notice of appeal, Caribbean Cement accepted that the notice of appeal was served outside of time but contended that there were good reasons for the delay.

[7] In submitting that the court should refuse extension of time for service and strike out the appeal, Dr Barnett relied on the case of **The Commissioner of Lands v Homeway Foods Limited & Stephanie Muir** [2016] JMCA Civ 21 ('**Homeway Foods**') in contending that the evidence disclosed that there was a deliberate failure to serve the notice of appeal and that no good reason has been advanced for the delay in serving the appeal or in making the application for an extension of time. Further, that the appeal lacks any real prospect of success and that justice merits the striking out of the appeal.

[8] On the other hand, Mr Piper KC, whilst indicating that he was not challenging the law relied on by Dr Barnett, submitted that the application for extension should be granted based on the explanation given for the delay and the merit of the appeal.

Discussion

[9] The court can extend time for compliance with any rule, practice direction, order or direction of the court (see rule 1.7(2)(b) of the Court of Appeal Rules ('the CAR')). Mr Piper has urged the court to grant the application to do so. Dr Barnett has submitted that no extension of time ought to be granted and that the appeal should be struck out. Rule 26.3(1)(a) of the Civil Procedure Rules ('CPR'), which applies by virtue of rule 2.14(a) of the CAR, empowers the court to strike out an appeal (or part of it) for failure to comply with a time limit fixed by a rule, order of the court or practice direction. Having considered the two applications, we have concluded that the application for extension of time for service of the notice of appeal should be refused and that the application to strike out the appeal granted.

[10] The decision in relation to Caribbean Cement's application turns on the considerations as were set out in **Homeway Foods** by Mcdonald-Bishop JA(Ag) (as she then was). These considerations were rehearsed at para. [44] of that judgment. In particular, at para. [44] (v), it is indicated as follows:

> "In exercising its discretion, the court will have regard to such matters as:
>
> (a) the length of the period of delay;
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> (b) the reasons or explanation put forward by the applicant for the delay;
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> (c) the merits of the appeal, that is to say, whether there is an arguable case for an appeal; and
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> (d) the degree of prejudice to the other party if time is extended."

[11] With regard to the length of the delay, we find this to be egregious as Mr Tarawali, through his counsel, had requested information from Caribbean Cement's attorneys as to whether a notice of appeal had been filed; and, after receiving an email from the registry of this court, requested service of the notice of appeal by correspondences dated 15 January 2024 and 16 April 2024. All these inquiries and requests were met with silence. Mr Tarawali was only served on 30 April 2024, after issuing the letter dated 16 April 2024, which indicated that if a response was not received within 14 days, certain steps to realise final judgment would be taken. It is also noticeable that the application for an extension of time was only made after Mr Tarawali had applied to strike out the appeal.

[12] We did not find that the reasons for the delay were compelling. Mr Craig Neil (in-house attorney for Caribbean Cement) stated that Caribbean Cement had been advised from 20 November 2023, that the matter should be the subject of an appeal by its counsel and, indeed, that the notice of appeal filed by counsel had been done in order to protect Caribbean Cement's interest, without instructions from Caribbean Cement. He indicated that between 14 November 2023 up to 30 April 2024, Caribbean Cement had made no decision as to whether the appeal should be pursued, as it was still assessing what ought

to be paid out by virtue of the learned judge's orders. This assessment included an attempt to obtain guidance as how to proceed with the orders numbered two, three and four of the learned judge's decision (see paras. 7, 8 and 9 of Mr Neil's affidavit).

[13] It is not apparent why this would take such an inordinate length of time and, in any event, those issues had no relevance to the areas of the judgment highlighted by counsel for Caribbean Cement, as to what would form the basis for the appeal. These were basically, issues of law. However, the court is aware that the absence of a reasonable excuse does not mean that the extension of time ought not to be granted.

[14] We also find that Mr Tarawali was prejudiced due to the recalcitrant conduct of Caribbean Cement. In his affidavit, Mr Tarawali pointed to the effect of the delay on his personal and financial affairs. Particularly, that he was in arrears in the payment of his legal fees and further that he had to defer undergoing an ophthalmologic procedure due to the prohibitive cost. Mr Tarawali exhibited a treatment plan setting out the cost of the procedure.

[15] The merit of the appeal is of greater relevance when dealing with extensions of time to access the court (as in the case at bar) rather than those dealing with procedural applications once the appeal is being processed (see paras. [17] and [18] of **Kareen Johnson Shirley v Courtney George Shirley** [2022] JMCA App 7).

[16] The grounds of appeal are set out:

> "(i) The Learned Judge erred in law with respect to her interpretation of Clause 13 of the Pension Scheme in that an election thereunder required the exercise by the Claimant/Respondent indicating to the Defendant/Appellant in writing his desire to adopt which of the options thereunder that he wished to take.
>
> (ii) The Learned Judge failed to recognize that the Claimant/Respondent having failed to give notice of his intention to exercise any of the options under Clause 13 of the Pension Scheme did not honor his obligations thereunder.

> (iii) The Learned Judge failed to appreciate that the cause of action arose when the Claimant/Respondent failed to exercise his option in writing.
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> (iv) The Learned Judge's findings of fact ... are against the weight of the evidence and ought not reasonably to be sustained."

[17] In relation to the factual findings of the learned judge, we are not able to discern where the learned judge could be said to have been in error or where her findings of fact can be challenged (see **Watt or Thomas v Thomas** [1947] AC 484, **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21). The learned judge made an assessment of the credibility of the witnesses, an assessment of expert witnesses for both parties, and gave reasons for preferring the evidence of Mr Tarawali's expert (see para. [50] of her judgment). She also spoke to the lack of crucial evidence from Caribbean Cement as to the cheque allegedly paid over to Mr Tarawali's wife, relevant to the payment of the pension emolument. At para. [40] of her judgment she stated:

> "I am of the view that there is a lacuna in the Defendant's case. The witness as to fact relied on by the Defendant was Mr. Dalmain Small who was not able to speak specifically to the circumstances under which Mr. Tarawali allegedy requested the cheque and the circumstances under which Mrs. Tarawali allegedly collected this cheque. The Defendant has not presented any evidence to counter the assertion by Mrs. Tarawali that she did not collect this pension cheque. They have not produced any documentation to say who collected this cheque and thereafter to trace where the cheque was lodged or whether it was encashed. Their expert witness did not even conduct any examination of her signature to determine what to make of it when compared with that of the questioned signature. There is no indication of any attempt to trace the return of the cheque and to supply it as part of the evidence. Mr. Tarawali on the other hand presented evidence of his bank books to show that he was never in receipt of these funds."

[18] The legal issues as to limitation of actions and interpretation of clause 13 of the Rules of Basic Contributory Pension Scheme ('the Pension Scheme Rules') are being

advanced as to merit. It is contended that the issue as to whether Mr Tarawali was statute-barred depends on the interpretation of clause 13 of the Pension Scheme Rules. It is submitted that the learned judge was wrong in her interpretation.

[19] Clause 13 reads as follows:

> "**WITHDRAWAL**
>
> If a member leaves the service of the Company before Normal Retirement Date, the benefits under this Scheme will be dealt with as follows:
>
> **Benefits Secured by Member's Contributions**
>
> The member will be entitled to the benefits secured by his or her own contributions (subject to payment to the Company of any outstanding balance of the premium advanced on his or her behalf) and may exercise one of the following options:-
>
> (a) to alter to paid-up, the benefits secured at Normal Retirement Date by the contributions made prior to leaving the service, and to continue contributions by quarterly, half-yearly or yearly payments to secure further benefits at Normal Retirement Date according to the Assurance Company's ordinary tables of rates in force at the date of leaving the service;
>
> OR
>
> (b) to pay no further contributions and receive at Normal Retirement Date or previous death the paid-up benefits secured by the contributions paid before leaving the service;
>
> Note: Exercise of this option is subject to the paid-up pension being at least $9.00 per annum.
>
> OR
>
> (c) to surrender the benefits for cash.
>
> Note: The cash payment would amount to a return of the contributions paid together with interest compounded

annually from the date of inclusion in this Scheme up to the date of withdrawal.

Any Member leaving the service in circumstances involving the Company in loss through dishonesty will be required to take the cash benefit under (c) above less any sum due to the Company or necessary to indemnify the Company against such loss.

Benefits secured by the Company's Contributions

Unless the member is dismissed for fraud or misconduct, he or she will be entitled to the benefits secured by the Company's contributions if he or she is leaving the service after completing a minimum period of five years; if the member is leaving the service before completing five years' service the Company reserves the right to decide if the member will receive these benefits.

If the member received the benefits secured by the Company's contributions, options (a), (b) and (c) above will be available in respect of those benefits. (Under Option (c) the cash payment would amount to a return of not less than 90% of the Company's contributions paid together with interest compounded annually from the date of inclusion in the Scheme up to the date of withdrawal.)

If the member elects to take option (a) or (b) in respect of his or her own contributions alone or together with the Company's contributions, individual policies will be issued by the Assurance Company in the member's name to secure the appropriate benefits, and upon the issue of these policies the member's benefits under the group pension policies will immediately cease.

Note: No member may withdraw from the Scheme while he or she is in the service of the Company."

[20] The learned judge had to determine whether clause 13 mandated that Mr Tarawali must, by a formal process, notify Caribbean Cement as to which of the three options he would be choosing at the time of his resignation.

[21] This is what the learned judge said concerning her interpretation of this clause:

> "26) With all due respect to the comprehensive submissions advanced by King's Counsel on this point, I do not find them compelling. Firstly, I do not agree that the Claimant was obliged to make an election in respect of option (b) at the time of his resignation. Pursuant to Clause 13 of the Pension Plan, the Claimant, had an option to, (a) continue making quarterly, half-yearly, or yearly payments towards his contributions to secure further benefit at the normal retirement date, (b) pay no further contributions and receive at normal retirement date the paid-up benefits secured by the contributions paid before leaving or (c) surrender the benefits for cash. Mr. Tarawali accepted that when he left the company he did not indicate that he was not going to select a cash payment and he was well within his right so to do as there is no provision in the Pension Scheme that required him to make an election. The Claimant having not invoked options (a) or (c) therefore option (b) obtained which gave the Claimant the right to elect to take his pension on reaching retirement age [sic]"

[22] Having reviewed clause 13, on a plain reading of the document, the employee can elect between three options. The word "elect" means "to opt for a choice to do something, to decide on or choose". The document indicates the beneficiary may elect one of the three options. So while it would be open to the beneficiary to indicate which option he or she is choosing, the indication would only be significant with respect to option (a), as arrangements would have to be made for continued contribution. Similarly, with respect to option (c), as it requires an immediate cash surrender. Options (a) and (b) do speak to individual policies that are to be issued by the Assurance Company in the member's name to secure the appropriate benefits. It could, therefore, suggest that Caribbean Cement should be notified in some manner if option (a) or (b) is preferred. However, no evidence was led by Caribbean Cement as to any such formal requirement for notification. In her review of the evidence of Mr Dalmain Small, the human resources manager at Caribbean Cement, the learned judge stated that he discussed the **culture** by which employees would request reimbursement of their pension. Culture speaks to an informal structure or method of operation adopted over a period of time.

[23] There are interpretative difficulties with the conclusion that Caribbean Cement would wish the court to draw that a formal notice of election was required. Clause 13 does not mandate that a formal notice of election of the option chosen should be made. Neither does it include any mandate that a failure by the employee to notify Caribbean Cement of his choice of option, and, in particular, option (b) would result in a claim for pension benefits being statute-barred after six years had passed. Option (b), as the learned judge stated would arise at the time that the employee has reached the requisite age of retirement. The learned judge categorically rejected the evidence of Caribbean Cement's witness that the benefits had been paid out to Mr Tarawali at his request at the time of his resignation. It is not obvious how the learned judge could be faulted for her determination on this point.

[24] In relation to the application to strike out the appeal, we are again guided by the principles set out in **Homeway Foods** at paras. [46] - [48] and [52] - [55]. As McDonald-Bishop JA observed, striking out is a draconian or extreme measure and should be regarded as a sanction of last resort. The approach must be holistic and a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. The issue of the overriding objective to deal with cases justly must also be considered (see rule 1.1 of the CPR which applies by 1.1(10) of the CAR). Dealing with cases justly includes the consideration of saving expenses as well as whether parties are on an equal footing and are not prejudiced by their financial position.

[25] It is significant that Mr Tarawali has a judgment in his favour and has had to sit through that period of delay without any certainty as to whether the judgment would be met or whether he would have to expend monies to defend the appeal. The actions of Caribbean Cement could be described as contumelious, as several requests for verification regarding the notice of appeal had been ignored. At paras. [52](iii), (iv) and (v) of **Homeway Foods**, McDonald-Bishop JA set out some of the pertinent considerations for this application:

> "(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.
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> (iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the noncompliance.
>
> (v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance."

Further at para. [53]:

> "It is recognised, however, that in proceedings at the appellate level, the requirements as to compliance with time limits are stricter and so the approach to the question whether an appeal should be dismissed or struck out for non-compliance with the rules and orders of the court or whether an extension of time should be granted for compliance is a bit different from that which applies to cases at first instance. In **United Arab Emirates v Abdelghafar and Another** [1995] ICR 65, which was cited by Smith JA in **Peter Haddad v Donald Silvera**, it was said:
>
> > 'The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. **The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial.**

> **The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals**.'" (Emphasis added)

[26] The purpose of such a draconian sanction is, therefore, "to promote a culture of compliance which is necessary to give effect to the dictates of the overriding objective as an indispensable feature of the civil justice system" (see para. [142] of **Homeway Foods**). These factors considered above significantly outweigh the desire of Caribbean Cement to have the appeal prosecuted (see para. [126] of **Homeway Foods**).

[27] Although the matter of the appeal is still in the infancy stage, Caribbean Cement has demonstrated an egregious defiance to deal with the situation promptly so as to ensure that Mr Tarawali is not prejudiced. In the round, having reviewed the merits of the appeal, we came to the conclusion as stated in para. [8] above.

Order

[28] We, therefore, order as follows:

1. The appellant's application for an extension of time to serve the notice of appeal, filed on 29 July 2024, is refused.

2. The application of the respondent for an order striking out the appeal, filed on 10 July 2024, is granted. Accordingly, the appeal is struck out.

3. Costs for both applications to the respondent to be agreed or taxed.