[2021] JMCA App 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE HARRIS JA

APPLICATION NO COA2021APP00039

BETWEEN ESTATE OF OWEN DEAN SMITH APPLICANT

AND NILZA SMITH RESPONDENT

Dr Mario Anderson for the applicant

Gordon Steer instructed by Chambers Bunny and Steer for the respondent

26 May, 21 and 25 June 2021

BROOKS P

[1] I have had the privilege of reading, in draft, the judgment of Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

FRASER JA

The applications

[2] The applicant estate before this court seeks an order that: 1) the time within which to file an application to vary or discharge the order of a single judge which was made on 27 November 2018 be extended; and 2) the order made in chambers by P Williams JA on 27 November 2018, be varied or discharged. The order of P Williams JA is in the following terms:

> "(1) On the material that has been presented, I am not satisfied that the applicant has crossed the threshold that there is a real

> prospect of success on appeal. Further, the applicant has not demonstrated sufficiently that the balance of hardship, irremediable harm or justice favors [sic] the granting of a stay of execution.
>
> (2) The order sought at (2) is not one that properly can be granted by me, on the information and material relied on.
>
> In the circumstances, the application for a stay of judgment pending appeal is refused. The order for disclosure is also denied."

[3] The applicant also seeks an order that in respect of the application for extension of time, there be no order as to costs and in respect of the application to vary or discharge the order of P Williams JA, costs be awarded to him or in the appeal.

The proceedings below

[4] The judgment which P Williams JA in the exercise of her discretion declined to stay, was that of J Pusey J (Ag) (as she then was), the learned trial judge ('LTJ'), who on 22 May 2018 in her judgment, **Nilza Smith v Estate of Owen Dean Smith** [2018] JMSC Civ 82, made the following orders:

> "1. That the claimant, the deceased's spouse, is entitled to one-half share of the family home located at 16 Phadrian Avenue, Kingston 6 in the parish of Saint Andrew;
>
> 2. That the said property be sold on the open market or by private treaty;
>
> 3. The claimant shall receive fifty percent (50%) of the proceeds of sale and the remaining fifty percent (50%) shall be distributed among the beneficiaries of the Will of Owen Dean Smith; …"

[5] In the action before the LTJ, the claim for a half share in the family home was brought by the [respondent], after her husband Owen Dean Smith had died. At his death, in his Last Will and Testament, he devised 25% of 16 Phadrian Avenue ('the property') to the respondent and their daughter, 50% to his first born, Robert Smith, and 25% to his other children, Angelicia Smith, Steven Smith and Ranier Smith.

[6] The evidence accepted by the LTJ disclosed that, prior to the death of Mr Smith, the respondent was not living with him at the property. She however regularly visited, shared meals, paid bills for, and engaged in occasional intimacy, with him. Additionally, it was accepted that the respondent maintained a room, furniture, clothing and appliances at the property, took her mail there and had free entrance to and exit from there.

[7] In arriving at her decision the LTJ interpreted section 6(2) of the Property (Rights of Spouses) Act ('PROSA') to mean that an action could be commenced under PROSA after the death of a spouse. Dr Anderson, who also appeared below, was unsuccessful in persuading the LTJ that even if PROSA was applicable, it would be subject to sections 7 and 10 of PROSA, which could result in the variation of the equal share rule under section 6 of PROSA. Dr Anderson renewed that submission before this court. The LTJ also found that "consortium continued between the claimant and her husband up to the time of his death". Hence the property remained the "family home" as defined by section 2 of PROSA at the time of Mr Smith's death. Therefore, based on the LTJ's interpretation of PROSA and the evidence that was accepted, the respondent was successful in her claim. The effect of the LTJ's order was that the respondent now has a 50% share in the property outright and a further 25% share jointly held with Abygail, the child of the marriage.

The application for extension of time

The relevant rule and the submissions

[8] Rule 2.10(1)(b) of the Court of Appeal Rules ('CAR') (Revised 3 August 2020), indicates that a single judge "may make orders for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". Rule 2.10(3) of the CAR provides that, "[a]ny order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order". Prior to the revision of the CAR as at 3 August 2020, rule 2.10(3) was 2.11(2). It is also important to note, that, when the CAR were first published in 2002, rule 2.11(2) did not include the words now following the word "court", which are, "on an application made

within 14 days of that order". That time stipulation was introduced into the rule, by the amendments to the CAR promulgated on 10 September 2015.

[9] The ruling of the learned single judge of appeal was made on 27 November 2018. A notice of application to vary or discharge her order was first filed 23 January 2019, more than a month outside the 14-day period limited for the application to be filed. An amended notice of application seeking to have time "abridged" was filed on 7 March 2019, almost three months outside the permitted time for application. Curiously, neither party was able to account for the long delay in the matter actually coming on for hearing. Be that as it may, rather than seeking to have the time abridged, the application of 7 March 2019, should have been for an extension of time to make the application. That anomaly having been pointed out to the parties by the court, on 16 June 2021, the applicant filed the application for extension of time. It is supported by an affidavit of that date from Mitzie Smith, legal clerk and paralegal within the office of Dr Anderson.

[10] Miss Smith, in her affidavit, outlined that when the application to vary or discharge the order of a single judge was made on 23 January 2019, she was unaware of changes in the CAR regarding when that application should have been filed. She further averred that, upon becoming aware of the changes in March 2019, she immediately filed an amended notice of application, but in error asked for time to be abridged rather than extended.

[11] In his submissions, Dr Anderson relied on rule 1.7(2)(b) of the CAR which empowers the court to extend time even where the time for compliance with a rule has passed. He cited the case of **Garbage Disposal & Sanitation Ltd. v Noel Green and others** [2017] JMCA App 2 which reaffirmed the well-known principles set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, regarding the approach to be adopted by the court, in considering an application to appeal out of time. Those principles are that, in exercising its discretion whether to extend time, 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. Even if there is no good reason for the delay, an application for extension of time may still be granted, if it is just so to do.

[12] Concerning the length of and reasons for the delay, relying on Miss Smith's affidavit, Dr Anderson maintained that he and his staff were unaware that the rule had changed, to require that an application to vary or discharge the order of a single judge, be made within 14 days of the order of the single judge; it having been the case previously, that there was no specified time within which to make such an application. He outlined that the application to vary or discharge the order made by P Williams JA was filed six weeks after the time stipulated in the CAR. He submitted that the length of the delay was not inordinate and even if the court considered it so to be, that could be cured by means other than a denial of the application. Counsel advanced that the court in exercising its discretion should consider the merits of the appeal, while being mindful of the principle espoused in the case of **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 that a litigant ought not to suffer for the mistake of his attorney-at-law. He also stated that on occasion the court has excused administrative errors: see **Alice McPherson v Portland Parish Council et al** [2020] JMCA Civ 64.

[13] Regarding whether there is an arguable case for an appeal, counsel advanced that given the judgment of this court in **Derrick Gentles v Kenneth Carr** [2019] JMCA Civ 31, it was clear there was merit in the appeal. Finally, in relation to the question of prejudice, counsel submitted that the respondent would suffer no real prejudice, as there would be no danger of the hearing of the appeal being missed and any prejudice that existed could be cured by costs. Conversely, counsel contended that if the extension of time was not granted, the applicant would be denied the opportunity to have the judgment of the lower court stayed pending appeal, in a context where there was a very real prospect of success, not just an arguable case. Based on all the arguments deployed, counsel urged the court to grant the application.

[14] Mr Steer, in opposing the application, took no issue with the general legal principles outlined by Dr Anderson. He however submitted that no evidence has been put before the court to justify a grant of an extension of time. He argued that the affidavit of Mitzie Smith does not go far enough to explain the delay from 27 November 2018, when the order sought to be varied or discharged was made, until 7 March 2019, when the amended application for its variation or discharge was filed, which contained the apparently mistaken reference to the time for the making of the application being "abridged" rather than "extended".

[15] Further, he contended there would be clear injustice to the minor child of the marriage if the extension was granted and a stay imposed, as she has not been able to ascertain even what she ought to obtain from the will of the deceased Owen Dean Smith. He relied on the case of **Raju Khemlani v Suresh Khemlani** [2019] JMCA App 17 in which the application for a stay was refused. Counsel invited the court to dismiss both the application for extension of time and the application for a stay.

Analysis

[16] The power of the court, pursuant to rule 1.7(2)(b) of the CAR, to extend time to comply with a rule even where the time for compliance has passed, as well as the legal principles that should guide the exercise of the courts discretion whether to extend time, have been accurately set out in the submissions of Dr Anderson. I will therefore proceed to conduct the necessary analysis guided by the principles outlined in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes**.

The length of and reason for the delay

[17] The delay of just under three months in making the amended application on 7 March 2019, the court does not find in all the circumstances to be inordinate, especially given the reason for the delay, which we accept. Though the limiting of a 14-day period within which to make the application for variation or discharge of the order of a single judge, has been the requirement since 10 September 2015, it is not beyond comprehension that the change from the previous absence of a time limit, was not

immediately appreciated by counsel for the applicant, or his office, in 2018. It being also accepted that the reference to "abridged" instead of "extended" was an error, we hold that on the peculiar facts of this case, these administrative errors fall into the category of "excusable oversight" and the applicant should not be made to suffer for the errors made by his counsel: see **Alice McPherson v Portland Parish Council et al** and **Salter Rex & Co v Ghosh**.

Whether there is an arguable case for an appeal?

[18] For reasons which will be elaborated on in the assessment of the application to vary or discharge the order of a single judge, in light of the decision in the case of **Derrick Gentles v Kenneth Carr**, there is an arguable case for an appeal.

The degree of prejudice to the respondent if time is extended

[19] We agree with the submissions of Dr Anderson that the extension of time will in and of itself cause minimal harm to the respondent as it will not affect the time of hearing of the substantive appeal. Whatever prejudice may enure, can be ameliorated by an appropriate costs order. It should also be noted that the case of **Raju Khemlani v Suresh Khemlani** relied on by Mr Steer does not assist him to resist this application as in that case the application for extension of time was granted, though the latter application for a stay was not.

[20] Having considered the relevant facts in the instant case against the principles outlined in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes**, it is manifest that the application for extension of time should be granted.

The application for variation or discharge of the order of the learned single judge

<u>The approach to an appeal against the exercise of a discretion</u>

[21] The refusal of P Williams JA to grant a stay of execution pending appeal was an exercise of her discretion. The approach of this court where there is an appeal against the exercise of a judge's discretion is well-settled. Relying on the *dicta* of Lord Diplock in

Hadmor Productions Ltd v Hamilton and Others [1982] 1 All ER 1042 applied by Morrison JA (as he then was) in **Attorney General v MacKay** [2012] JMCA App 2, in **Alice McPherson v Portland Parish Council, The National Works Agency and The Attorney General of Jamaica** [2019] JMCA App 20, Fraser JA (Ag), (as he then was), stated at paragraph [57] that:

> "Those principles indicate that the appellate court should defer to the exercise of the discretion by the trial judge unless it finds that the discretion was informed by a misunderstanding of the law or the evidence, or by an inference drawn that a fact does or does not exist which is subsequently shown to be wrong. The principles also indicate that interference may also be warranted where there has been a change of circumstances after the decision appealed from, that would have justified the trial judge varying his initial order. Finally, even where no erroneous assumption of law or fact can be identified, if the judge's exercise of discretion is so aberrant that no reasonable judge acting judicially could have made the decision appealed from, then that is a basis to have it set aside. Lord Diplock, however, made it clear that simply because the members of the appellate panel would have exercised the discretion differently is not a basis for interfering."

[22] In the circumstances of this application, the court will therefore need to examine whether the approach of the learned judge of appeal to the application for a stay of execution was incorrect in the application of any principle, or her analysis of the facts, or there has been a change of circumstances since her decision, which dictates a different outcome.

The principles determining whether a stay should be granted

[23] The principles guiding the exercise of the court's discretion to grant a stay of execution are also well-known. If there is no merit in the appeal, then the matter ends there. The stay should not be granted. However, if the court concludes "there may be some merit in the appeal" it should "make that order which best accords with the interest of justice". In determining what "that order" is, the court should look at the balance of harm or hardship that will occur to either party if the stay is or is not granted: see **Myrna Douglas v Jacqueline Brown and Easton Douglas** [2017] JMCA App 5 referencing

Phillips LJ in **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited FC** [1997] EWCA 2164 and **Dawkins Brown v Public Accountancy Board** [2020] JMCA App 25, in which the principles were reaffirmed.

Is there merit in the appeal?

[24] To demonstrate that there is merit in the appeal, Dr Anderson relied heavily on the case of **Derrick Woodburn Gentles v Kenneth Carr**, decided subsequently to the orders of the LTJ and the learned single judge of appeal in the instant matter. In **Derrick Woodburn Gentles v Kenneth Carr**, Edwards JA examined section 6(2) in the light of sections 3, 6(1), 7, 9, 11, 12, 13 of PROSA. The learned judge of appeal writing for the court, highlighted difficulties that would be encountered, if an application is not commenced before a spouse has died. These difficulties include her finding that: 1) there was no provision of PROSA which allowed for the making of an application to vest property in a surviving spouse after the death of the other spouse; and 2) it would not be possible after the death of a spouse for agreements to be reached between spouses on particular matters, as contemplated by PROSA. She concluded that a surviving spouse is not entitled to apply for division of property under PROSA, after termination of the marriage by the death of the other spouse. At paragraph [32] the learned judge of appeal summarised the reasons for her conclusion as follows:

> "There is, therefore, no provision in PROSA which contemplates or accommodates an application by a surviving spouse after termination of marriage by death. It is clear, therefore, that section 6(2), which merely declares the entitlements to the family home, provides no exception to the general rule in section 3(1). It creates no special category of spouse to whom no other provision of PROSA need apply, once the entitlement is stated in section 6(2). Section 6 merely acts to preserve the entitlement of a surviving spouse who may have brought a claim and death of his spouse intervened. Any other interpretation would make nonsense of the provisions of PROSA and place the widow or widower in a better position than those equally entitled to a half share in the family home."

[25] In response, Mr Steer, for the respondent, lamented that the case of **Derrick Woodburn Gentles v Kenneth Carr** went from an application for leave to appeal to a full hearing of the appeal, within the same sitting, which led to the court being inadequately assisted with some of the relevant authorities. Concerning the observation made by Edwards JA in **Derrick Woodburn Gentles v Kenneth Carr** that, "[a]ny other interpretation would make nonsense of the provisions of PROSA and place the widow or widower in a better position than those equally entitled to a half share in the family home", counsel submitted that, where there was a happy couple and the husband died in his sleep, the interpretation adopted in that case, would place the widow at a disadvantage, compared to the situation she would have been in, had she been separated or divorced from her husband.

[26] Another anomalous situation created by the decision in **Derrick Woodburn Gentles v Kenneth Carr**, Mr Steer argued, was that, while under section 8 of PROSA one spouse even though separated cannot engage in a transaction concerning the family home without the consent of the other, a spouse could, by a Will, defeat the 50% entitlement of the other spouse. He submitted that the New Zealand cases of **Davidson v Perpetual Trustees SC Christchurch** M 301/78 [1979] NZHC 183, **Grose v Poppe HC Wanganui** M15/79 [1981] NZHC 254 and **Poppe v Grose** CA63/81 [1982]1 NZLR 491, that examined legislation similar to PROSA, supported the interpretation of the effect of section 6(2) of PROSA adopted by the LTJ.

[27] Mr Steer also contended that even if PROSA did not apply, the respondent could also have recourse to the Inheritance (Provision for Family and Dependents) Act, the rules of equity or the inherent jurisdiction of the court, to give the surviving spouse the remedy to which she would otherwise be entitled under section 6 of PROSA. This is a context where he maintained that, "[t]he evidence before the [LTJ] showed an abundance of evidence of contribution by the Respondent towards improvements to the family home as well as maintenance of the household and the child of the marriage".

[28] Whatever might be the outcome of the appeal when heard, in light of the authorities which Mr Steer has placed before the court, which were not considered in **Derrick Woodburn Gentles v Kenneth Carr**, the fact is, at present, the law as stated by this court, is that PROSA does not apply to a situation such as presents in this case. It is manifest, therefore, that circumstances have changed from the time when the learned single judge of appeal held that the applicant had not passed the threshold of a real prospect of success on appeal. We are constrained to hold that there is merit in the appeal.

Considering the balance of harm what order best accords with the interests of justice?

[29] We must now go on to determine if there is also a basis to interfere with the finding of the learned judge of appeal that "the applicant has not demonstrated sufficiently that the balance of hardship, irremediable harm or justice favors [sic] the granting of a stay of execution". Depending on the outcome of the appeal there are a number of different possibilities that could result in the entitlement of the respondent being less than it is now declared to be; or even as was the outcome in **Derrick Woodburn Gentles v Kenneth Carr**, the matter being remitted to the Supreme Court to be tried under the common law. It is against that background that the question of hardship to either the respondent or the applicant estate has to be judged.

[30] The applicant in this claim is the estate of the deceased spouse Owen Dean Smith. Robert Smith the executor and first son of the deceased spouse is entitled to 50% of his estate under the will. Angelicia, Steven and Ranier Smith, the other children of the deceased, apart from Abygail, the child of the relevant marriage, would jointly receive 25% of the estate under the will. The respondent and Abygail would together share the other 25% entitlement. Therefore, under the court order, the respondent together with her daughter is entitled to 75% of the property, whilst under the terms of the will, they would be jointly entitled to 25% of the property.

[31] It should be noted that the interests of the executor are not entirely coincident with the interests of the beneficiaries. As a general rule the duties of an executor are to

realise the estate, pay the testator's just debts and testamentary expenses and protect the estate from dissipation, pending distribution of the assets. Robert Smith is both an executor and the main beneficiary under the will. Together, Robert, Angelicia, Steven and Ranier Smith, are entitled to a 75% share in the property under the will. Given the overlapping interests Dr Anderson submitted that there were no real conflicts between the role of executor and beneficiary in these circumstances.

[32] He also stated that it would be difficult for the executor to perform his function at this time as the extent of the entitlement to a share in the property of each relevant party was still ultimately to be determined. He contended that it would be a more appropriate use of the courts resources for the matter to be determined by this court rather than the applicant seeking to approach the Supreme Court for directions on the manner in which shares in the property should be distributed.

[33] In separate affidavits both dated 21 January 2019 and filed 23 January 2019, Steven and Ranier Smith indicate that they have lived at the property for most if not all of their lives, and still reside there. Steven outlined that he had to pause his university studies due to his inability to pay the requisite fees. They each further state that they verily believe that, "an option for the rest of the beneficiaries to buy the Respondent's share of the property should have been given to the other beneficiaries of the estate…" In any event, they also both aver that selling the property would cause them both great financial stress and expressed their inability to rent or purchase an apartment.

[34] Dr Anderson submitted that if the stay was not granted and the appeal was successful the result would be rendered nugatory as the property would already have been sold. He argued that, conversely, the respondent would not suffer great harm and prejudice if the stay was granted, as she does not reside at the property. Further, counsel highlighted that the respondent remained a beneficiary under the will and any delay in the realisation of her interest would be compensated for, by the increase in the value of the property.

[35] Mr Steer in response maintained that there should not be a stay. He invited the court to bear in mind that Abygail Smith, a young child, was involved and the respondent was her sole support. Further, that on the evidence, her father, the deceased spouse, had not been well for a considerable length of time. The obvious inference counsel wished the court to draw from this last submission, was that the burden of maintenance of the child of the marriage, had for long been solely on the respondent.

[36] Therefore, counsel contended the property should be valued and sold to whoever wishes to buy it. The proceeds of sale should then be placed in an interest bearing account pending the outcome of the appeal. Counsel indicated that they had written letters asking the property to be valued but got no response. He argued that the respondent would be prejudiced if the value of the property were allowed to run down. He contended that as Phadrian Avenue is a very upscale area, the value may go down by "millions".

[37] Having assessed all the submissions, the critical factor is that there has been a fundamental change in circumstances after the matter came before the learned single judge of appeal. Based on the law as declared in **Derrick Woodburn Gentles v Kenneth Carr**, there is currently a real prospect that 50% of the interest that the respondent now has in the property, based on the judgment of J Pusey J (Ag), may shift to the applicant estate. In that context, the greater number of beneficiaries under the will who may, on appeal, gain the lion's share of the interest in the property do not wish the property to be sold. Two of those beneficiaries still live at the property, have done so for several years and have claimed a sentimental attachment to the property. The order of the LTJ did not give the first option to Robert, Angelicia, Steven and Ranier to purchase the interest of the respondent and her daughter and in any event Steven and Ranier indicated they are financially unable to do so. Of course, it also needs to be borne in mind that it appears that Steven and Ranier are living rent free at the property. That however can be addressed by an accounting when the respective interests in the property are finally determined.

[38] Considering all the factors just outlined, it seems clear that the order that best accords with the interests of justice is for a stay of execution to be granted pending the determination of the appeal or further order of the court. However, in the interests of maintaining an appropriate balance and to ensure that the respondent and Abygail are not disadvantaged by the delay in the realisation of their interests, that stay must have a condition attached. The condition is that the executor of the applicant estate undertakes that, within three months of the respective interests of the parties in the property being determined by this court, he shall give an account and pay to the respondent, in keeping with the percentage interest she has in the property, her portion of the fair market value of the rental that the property could have earned or did earn, from 22 May 2018, the date of the judgment of J Pusey J (Ag), to the date of the judgment of this court on the determination of the appeal. The undertaking should be in writing and given by the executor, or by counsel on behalf of the executor, within 14 days of the date of this judgment. If such an undertaking is not given within the time stipulated, the stay shall not take effect.

[39] No variation or discharge of the ruling of the learned single judge of appeal regarding the disclosure order was sought. Accordingly, that part of the learned judge's ruling should be affirmed.

Costs

[40] Dr Anderson submitted that if the application for extension of time was successful, there should be no order as to costs, given the administrative error which occasioned the need for the application. Regarding the application for the order of the learned single judge to be varied or discharged and a stay imposed, he argued that if it was successful, costs should either be awarded to the applicant or should be costs in the appeal.

[41] Mr Steer argued that in any application for extension of time the respondent ought to be awarded costs in any event. In relation to the application for variation or discharge and the imposition of a stay, he contended that the very best the applicant could hope for if he was successful was that costs should be costs in the cause.

[42] The court agrees with the submissions of Mr Steer. There being no unusual circumstance that requires a departure from the application of general principles on the awarding of costs in these types of applications, costs should be awarded to the respondent on the first application and to be in the appeal in the second.

HARRIS JA

[43] I too have read in draft the judgment of my brother Fraser JA. I also agree with his reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

1. The application for extension of time for the filing of the application to vary or discharge the order of a single judge is granted.

2. The time for filing the application to vary or discharge the order of a single judge is extended to 7 March 2019.

3. The amended application filed 7 March 2019 for variation or discharge of the order of P Williams JA made on 27 November 2018, stands as having been filed within time.

4. The order made by P Williams JA on 27 November 2018, in so far as it refused the application for a stay of judgment pending appeal, is discharged. In so far as it refused the order for disclosure, it is affirmed.

5. The judgment of J Pusey J (Ag) on 22 May 2018, **Nilza Smith v Estate of Owen Dean Smith** [2018] JMSC Civ 82, is stayed, pending the determination of the appeal or further order of the court, **on condition that**, the executor of the applicant estate undertakes that, within three months of the respective interests of the parties in the property being determined by this court, he shall give an account and pay to the respondent, in keeping with the percentage

interest she has in the property, her portion of the fair market value of the rental that the property could have earned or did earn, from 22 May 2018, the date of the judgment of J Pusey J (Ag), to the date of the judgment of this court on the determination of the appeal. The undertaking should be in writing and given by the executor, or by counsel on behalf of the executor, within 14 days of the date of this judgment. If such an undertaking is not given within the time stipulated, the stay shall not take effect.

6. Costs of the application for the extension of time to the respondent.

7. Costs of the application for variation or discharge of the order of the single judge to be costs in the appeal.