

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 2/2018

COA2019APP00107 & COA2019APP00048

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)**

BETWEEN	DON O FOOTE	APPLICANT
AND	THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL	RESPONDENT

Don Foote in person

**Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers,
Fletcher & Gordon for the respondent**

29 and 31 May 2019

PHILLIPS JA

[1] On 29 May 2019, there were two applications before the court. The first, was one filed by Don Foote on 21 May 2019, in which he sought an extension of time to 21 May 2019, to comply with certain orders made by P Williams JA on 25 September 2018, or in the alternative, that documents that he had filed on 21 May 2019 should stand as having been properly filed. The second application before the court was filed by the Disciplinary Committee of the General Legal Council (the Committee) on 15 February

2019, to strike out Mr Foote's appeal on the basis that he had failed to comply with orders numbered 1 and 5 of the said case management orders made by P Williams JA.

[2] We decided to hear the application for extension of time first, as, if that application succeeded, there would be no need to proceed with the application to strike out the appeal. We noted that the court had the power to extend or shorten the time for complying with any order or direction of the court even if an application for an extension is made after the time for compliance has passed (see rules 1.7 and 2.15 of the Court of Appeal Rules).

[3] In the order numbered 1 of the case management orders made on 25 September 2018, P Williams JA instructed Mr Foote to forthwith remove the names of the members of the Committee which had been stated in the notice and grounds of appeal he had filed, as it was improper to name them specifically, individually. The order numbered 5 stated that Mr Foote shall file and serve full written submissions and a bundle of authorities on or before 8 February 2019.

[4] Mr Foote, in an affidavit filed 21 May 2019 in support of his application for an extension of time, indicated that he was indeed only partially compliant with the orders made by P Williams JA, but that by 21 May 2019, when the appeal ought to have been heard, he had fully complied with orders numbered 1 and 5, respectively. He also indicated that he was not relying on any authorities and so, there was no need to file a bundle in relation thereto. He also reminded the court that he had conceded costs to the Committee on 21 May 2019, arising out of his request for an adjournment, and his

failure to comply with the court orders prior to that date. Additionally, he had paid in due time, pursuant to order numbered 2 made by P Williams JA, all the costs incurred by the Committee members named in the notice and grounds of appeal he had filed (whose names he was ordered to remove), from the filing of the notice of appeal on 26 February 2018 to 25 September 2018 (the date of the case management conference).

[5] Mr Foote deponed that his failure to comply with the orders numbered 1 and 5 was due to "oversight and/or blameless inadvertence". He told the court that his appeal had merit because the complainant in the matter had acted on bad legal advice when she terminated a contract which had been entered into with a purchaser seven days before its completion. He indicated that the court had ordered the property to be sold and that the proceeds of the same should be split equally between the parties. He also stated that the Committee had erred in its decision as there was no evidence of negligence or neglect on his part, and moreover, his actions were based on or related to his client's instructions.

[6] Mrs Sandra Minott-Phillips QC had provided written submissions in opposition to Mr Foote's application for extension of time, and in support of her application to strike out his appeal. She relied on dictum from Brooks JA in **H B Ramsay & Associates Ltd and Others v Jamaica Redevelopment Foundation Inc and Another** [2013] JMCA Civ 1, where at paragraph [21] he accepted a submission that 'inadvertence' "was a conclusion to be drawn from an explanation and was not itself an explanation", and that although "oversight" was an explanation, it was not a good explanation.

[7] Queen's Counsel stated that Mr Foote's oversight had been brought to his attention in a letter from her offices to him, dated 28 January 2019, wherein he was reminded that he was not in compliance with, at that time, order numbered 1. She urged Mr Foote to comply, failing which she would file an application to dismiss his appeal. She also referred to a notice dated 30 January 2019, issued by the Registrar of this court to all attorneys-at-law, reminding them of the need to comply with timelines set out in case management orders, or risk having their appeals dismissed. Queen's Counsel asserted that the Committee, having filed and served the application to strike out Mr Foote's appeal together with an affidavit in support on 15 February 2019, Mr Foote had still not complied or sought an extension of time to comply with the said case management orders, until 21 May 2019, the day when the appeal was fixed to be heard. She also stated that Mr Foote's failure to file his submissions had prevented the Committee from filing its submissions in response. She stated, therefore, that there was no credibility to his argument that his non-compliance was due to "oversight and/or blameless inadvertence".

[8] Queen's Counsel contended, in reliance on **The Commissioner of Lands v Homeway Foods Limited and Another** [2016] JMCA Civ 21, that Mr Foote's application for an extension of time and his affidavit in support, did not conform to the requirements for the granting an extension of time, and the appeal should therefore be struck out. She indicated that in his affidavit, Mr Foote had not attested to there being any merit in his appeal, or that he was being prejudiced in any way, and so there was no proper evidence before the court in support of his application, which, as indicated in

previous authorities from this court, was necessary for an application for extension of time to succeed. In her written submissions she noted that the court may examine, if it chose to do so, the record of appeal, but that if it was so minded, it would reveal that Mr Foote's appeal had no merit.

[9] Mrs Minott-Phillips contended that the main issue in the appeal was the recovery of a fine (which he had duly paid to avoid the alternative sanction ordered by the Committee of suspension from practice if he had failed to pay), and so Mr Foote would suffer no undue prejudice if his application was refused, as he had not been struck off or suspended from the Roll of attorneys. On the other hand, she argued, the Committee would be prejudiced as the day fixed for the hearing of this appeal, and in respect of which the Committee had been scheduled to appear, had already been lost due to the adjournment which had occurred on 21 May 2019. She stated that that would likely result in a delay of hearing or dealing, not only with this appeal, but with other matters involving the Committee before this court. Further, she submitted, that the court also had to consider the adverse impact on other litigants before the court if the application were granted as the rescheduling of the applicant's appeal would delay the hearing of other matters.

[10] It is true that Mr Foote had failed to remove the names of the Committee members forthwith from the notice of appeal, in breach of the order numbered 1, and had also failed to file and serve his full written submissions and a bundle of authorities on or before 8 February 2019, in breach of the order numbered 5 of the orders made by P Williams JA. However, it is also true that Mr Foote had attempted to comply with

those orders on 21 May 2019, by filing and serving an amended notice of appeal, removing the names of the Committee members, and by filing and serving written submissions on that same date. He had indicated that he would not be relying on any authorities at the hearing of the appeal, and so had no need to file a bundle of authorities. Mr Foote's delay in complying with the order numbered 1 would have been seven months and three weeks late, and his delay in complying with the order numbered 5 would have been approximately three months and two weeks out of time. Accordingly, in our view, the delay in compliance, particularly in respect of the order numbered 1, may appear to have been inordinate.

[11] Mr Foote's reason for not complying with the order was, as indicated, "oversight and/or blameless inadvertence. Brooks JA in **H B Ramsay** indicated that "inadvertence" by itself was a conclusion and not an explanation, but he also accepted that "oversight" was an explanation, albeit not a good one. We find Mr Foote's reason for non-compliance unsatisfactory, especially in the light of the fact that in January of 2019 he had been invited to do so in a certain respect by Queen's Counsel, and then given notice of his failure to comply by service of the application to strike out his appeal (although no date had been set or stated in the application served on him). His "oversight", does seem difficult to understand in those circumstances. However, it is a reason nonetheless, and in our view, may be "excusable" when consideration is given to all the circumstances of the nature of the default.

[12] We must now therefore go on to assess whether Mr Foote's appeal has merit, the risk of prejudice to both parties, and what is just in the circumstances.

[13] It is true that, unhelpfully, Mr Foote did not state in his affidavit filed in support of his application to extend time that his appeal had merit, or that he would be prejudiced. As Queen's Counsel predicted, this court was forced to examine the issue of merit by combing through the record of appeal filed 14 March 2018. The Committee had found that Mr Foote's conduct amounted to "inexcusable or deplorable negligence or neglect in the performance of his duties" and so it, *inter alia*, ordered him to pay a fine of \$1,000,000.00 with costs to both the complainant and the General Legal Council, failing which he would be suspended from practice for one year. In his arguments before this court, Mr Foote said that the Committee erred in its decision as it was the complainant who had acted on bad legal advice and terminated the contract seven days before its completion, in circumstances where the court had ordered the sale of the premises, and the complainant only had interest in one-half of the proceeds of sale of the property. He stated that he had not been negligent. Mr Foote's grounds of appeal also stated that the Committee had ignored relevant matters such as the fact that he was acting on instructions from his client, and that the Committee had also used a wrong premise to ground its decision. In our view, all of the above grounds are deserving of full argument.

[14] As indicated, Queen's Counsel had asserted that the Committee would be prejudiced by the delay in hearing the latter. However, in our view, the prejudice to Mr Foote would be greater having regard to the implications of his conviction before the Committee on his reputation as an attorney.

[15] In assessing where the justice of the case lies, we had noted that there was indeed partial compliance with the court orders dated 25 September 2018. Unlike **Homeway Foods Limited**, in the instant case, there was no continuous disobedience of the court's orders, over a very long period. While Mr Foote, by the documents that he had filed on 21 May 2019, had attempted to effect compliance on the day when his appeal ought to have been heard, that attempt demonstrates some level of seriousness about prosecuting his appeal, and was also an attempt to minimise the negative effects of his default. There had also been some compliance with other orders that had been made by P Williams JA on 25 September 2018, as already stated. Indeed, Mr Foote's written submissions are not lengthy, and Mr Foote has indicated that he will not be relying on any authorities, which, in effect, may reduce the size of the Committee's written submissions and authorities in response. It is also true that Mr Foote had conceded costs of the adjourned appeal to the Committee arising from his non-compliance.

[16] Therefore, in our view, in these circumstances, particularly considering the implications of his conviction before the Committee, relative to the nature of the default in his compliance, the justice of the case would be better served by granting Mr Foote's application for an extension of time to 21 May 2019, and permitting the amended notice of appeal, and written submissions he had filed on that date, to stand as properly filed. McDonald-Bishop JA in **Homeway Foods Limited** stated that "striking out is a draconian or extreme measure, and therefore, should be considered as a sanction of last resort". For the reasons aforementioned, in our view, we do not think that we

ought to employ this "extreme measure" on this application, in this case. Consequently, there is no need for the court to consider the Committee's application to strike out Mr Foote's appeal, which would therefore not be granted. We would also award costs in respect of the application for extension of time to the Committee, since the application was necessitated due to Mr Foote's delinquency.

[17] The orders made are as follows:

1. The application for extension of time filed 21 May 2019 is granted. Time is extended to 21 May 2019 to comply with the court's order dated 25 September 2018. The amended notice of appeal and written submissions filed 21 May 2019 shall stand as having been properly filed.
2. The application to strike out the appeal filed 15 February 2019 is refused.
3. Costs of the application for extension of time to the Committee to be taxed if not agreed.