[2012] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 205/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**RALFORD GORDON**	**APPLICANT**
AND	**ANGENE RUSSELL**	**RESPONDENT**

Miss Debby-Ann Samuels instructed by Debby-Ann Samuels & Co for the applicant

Mrs Jennifer M. Hobson-Hector for the respondent

17 January, 13 April, 27 July, 3 October 2011

and 30 March 2012

MORRISON JA

[1] I have had the advantage of reading, with admiration and respect, the careful judgment prepared by Phillips JA in this matter, and I am happy to be able to accept the solution which she proposes to the problem faced by the applicant. I therefore agree that the applicant should be granted an extension of time within which to file a notice of appeal from the order made on 2 September 2010 by the learned Resident

Magistrate for the parish of St. Ann. It follows from this order that the sums payable for the due prosecution of the appeal can then be paid at the same time.

[2] However, for my part, I wish to reserve my opinion on the question of whether the majority decision of this court in **Patterson and Nicely v Lynch** (1972) 12 JLR 1241 is "not in keeping with the development of the legislation or the case law leading up to it is not in the interests of justice and is therefore potentially flawed", as Phillips JA suggests at para [57] of her judgment. Given the way in which the court has determined, after due consideration, that this application should be disposed of, I do not think that the correctness or otherwise of that decision is of any further relevance to the court's decision today and, on that basis, I am accordingly content to leave that question for another day when it is directly in issue".

PHILLIPS JA

[3] This application had many days before the court as the respondent firstly did not appear, and then was unrepresented, and as the application raised important issues of law, the respondent was given every opportunity to obtain representation. We are grateful to counsel for agreeing to assist the respondent and for the efforts made by both counsel by way of their oral and written submissions in order to help the court in its deliberations on a very interesting matter.

[4] This application arises from the decision of Mrs Ruth Lawrence, Resident Magistrate for the parish of St Ann, made on 2 September 2010 in the Resident Magistrate's Court and Court of Petty Sessions holden at Brown's Town in the said

parish. It was ordered that (i) the applicant was non-suited; and (ii) the applicant should pay costs to the respondent in the sum of $27,400.00. Verbal notice of appeal was given on 2 September 2010.

[5] On 14 September 2010, counsel for the applicant, lodged written notice and grounds of appeal at the Resident Magistrate's Court in Brown's Town, St Ann. The grounds of appeal were:

> "(i) That the Learned Magistrate erred in law in her application of the (bona-fide belief test) in ruling that because the Plaintiff said he had a suspicion that the child was not his, that he knew that the child was not his.
>
> (ii) Moreover the Learned Magistrate in making her ruling failed to consider that a suspicion does not amount to reasonable proof or knowledge of the child not being his.
>
> (iii)The Learned Magistrate also erred in refusing the Plaintiff from recovering all that he has spent in maintenance of the child for the eight (8) years from the time of her birth."

[6] The appellant sought the following orders:

> "(i) That the Judgment of the Learned Magistrate, entered on the 2nd September 2010, be set aside and judgment be found for the Plaintiff/ Appellant.
>
> (ii) That the sum of Twenty Seven Thousand, Four Hundred Dollars ($27,400.00) paid by the Plaintiff/Appellant in respect of the Order herein, be returned forthwith to the Plaintiff/ Appellant."

[7] Notice of application for court orders was initially filed on 3 November 2010, and subsequently amended and re-filed on 25 February 2011, requesting that the applicant be granted an extension of time in which to file his notice of appeal, and for the

payment of sums for the due prosecution of the appeal. The applicant asked that the judgment be stayed pending the decision of the Court of Appeal.

[8] The application was based on the following three grounds:

> "(i) That the Applicant took steps to file his Notice of Appeal through his attorneys within the required time but due to a misunderstanding the required sums for due prosecution were paid thereafter.
>
> (ii) That the Applicant has reasonable grounds upon which to base his appeal.
>
> (iii) That the Learned Judge erred in her application of the law as it relates to the bonafide test in determining judgment in favour of the Respondent in the court below."

[9] The applicant relied on the affidavit of Debby-Ann Samuels, the attorney who had conduct of the matter on his behalf at all material times, sworn to on 28 October 2010. Miss Samuels deposed that the applicant had given verbal notice of appeal when the matter had been determined in the Resident Magistrate's Court on 2 September 2010, and he was non-suited and ordered to pay the sum of $27,400.00. She also stated that she had filed the notice and grounds of appeal on 14 September 2010 in the Resident Magistrate's Court in Brown's Town, St Ann, but the notice and grounds of appeal were sent back to her office stamped "Received" by the Resident Magistrate's Court along with instructions to send the notice and grounds to the Court of Appeal. Miss Samuels indicated that she had followed these instructions.

[10] Miss Samuels on 4 October 2010, stated that she had received a letter from the Resident Magistrate's Court stating that the notice and grounds of appeal were sent back to her office because she had not sent the amount of $600.00 required by section 256 of the Judicature (Resident Magistrates) Act (JRMA) for the due prosecution of the appeal.

[11] Miss Samuels further deposed that by the time the above information had been received, the time for lodging the notice of appeal had expired, and efforts to remedy the situation were unsuccessful, as the notice and grounds of appeal were rejected by the Resident Magistrate's Court. She indicated that what had occurred was due to an oversight on her part and, therefore sought the court's assistance so that the applicant would not bear the consequences of the same. She confirmed that she had received instructions from the applicant to appeal the decision of the learned Resident Magistrate, and that the applicant had a good arguable case and reasonable grounds upon which to appeal the said decision.

Issue

[12] The applicant has therefore raised the issue of whether the Court of Appeal can extend the time for him to file notice and grounds of appeal, as well as extend the time to pay the sum of $600.00 required for the due prosecution of the appeal.

[13] The provisions relevant to that issue are sections 251, 256 and 266 of the JRMA and section 12 of the Judicature (Appellate Jurisdiction) Act (JAJA).

[14] Section 251 of the JRMA states that subject to the provisions of the Act, "an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings".

[15] Section 256 of the JRMA, outlines the appeal process in the following manner:

> "256. The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Courts, and a copy of it shall be served … within fourteen days after the date of the judgment; **and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of six hundred dollars as security for the due prosecution of the appeal**, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of six thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
>
> …
>
> On the appellant complying with the foregoing requirements, the Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree, or order appealed against.
>
> Such statement shall be lodged with the Clerk of the Courts, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.
>
> The appellant shall, within twenty one days after the day on which he received such notice as aforesaid, draw up and serve on the respondent, and file with the Clerk of the Courts, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine.

> **If the appellant after giving notice of appeal and giving security as aforesaid fails duly to prosecute the appeal, he shall forfeit as a court fee the sum of six hundred dollars deposited as aforesaid**.
>
> **If he appears in person or by counsel before the Court of Appeal in support of his appeal, he shall be entitled to a return of the said sum of six hundred dollars whatever may be the event of the appeal**." (emphasis mine)

[16] Section 256 therefore contemplates that in order for a civil appeal from the Resident Magistrate's Court to be heard, the appellant must:

(i) give notice of appeal at the time of judgment, or within 14 days of such judgment;

(ii) serve notice of appeal on the opposite party within 14 days of judgment;

(iii) deposit in the court the sum of $600.00 for the due prosecution of the appeal at the time of taking or lodging the appeal;

(iv) give security for costs and for the due and faithful performance of the judgment and orders of the Court of Appeal in the sum of $6000.00 within 14 days after taking or lodging the appeal. On the appellant complying with requirements (i) through (iii), the magistrate will draw up a statement of his reasons for the judgment, decree or order appealed against, and lodge this statement with the clerk of the courts who will give notice to the parties.

(v) draw up and serve grounds of appeal, on the respondent and file these grounds with the clerk of the courts within 21 days of receiving notice from the clerk of the magistrate's reasons. If the appellant fails to draw up, serve and file grounds, his right to appeal "shall, subject to the provisions of section 266, cease and determine".

[17] By virtue of section 266 of the JRMA, where the justice of the case so requires, the Court of Appeal may hear the appeal of an appellant who fails to comply with "formalities" prescribed by the JRMA resulting from some inadvertence, ignorance or necessity. The section provides:

266. Powers of the Court of Appeal

> "266. The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

Section 12(2), which deals with the power of the Court of Appeal to grant extensions in relation to the matters mentioned in section 256 of the JRMA, states:

> " 12 (1)...
>
> (2) Notwithstanding anything to the contrary the time within which-
>
> (a) notice of appeal may be given or served;

(b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;

(c) grounds of appeal may be filed or served,

in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

Submissions of counsel for the applicant

[18] Although in the amended notice of application counsel sought an extension of time to file the notice and grounds of appeal, no arguments were really advanced on that aspect of her application; instead counsel focused on the application for extension of time to pay the sum for the due prosecution of the appeal. In that regard, counsel for the applicant submitted that payment for the due prosecution of the appeal is the type of "formality" contemplated by section 266 of the JRMA, as it is a "thing done as a matter of course for the appeal to be heard". She further argued that the payment "does not go to the gravamen of the issues" of the appeal, and the applicant should not be denied his constitutional right to due process of law which includes the right to appeal. In this case, the notice and grounds of appeal were filed within the required time period, while the fee for due prosecution was paid some days out of time. Accordingly, counsel argued further, once the appeal had been filed in time, the Court of Appeal can and should exercise its power under section 266 to allow the applicant to make the payment for the due prosecution of the appeal at a later date.

[19] In support of her submissions, counsel presented extracts from the Hansard of the Proceedings of the House of Representatives of Jamaica Session 1962-1963, No. 1, (the Hansard) where at pages 163-167 the parliamentary debate surrounding the Judicature (Appellate Jurisdiction Bill) is recorded.

[20] At page 165, column 3, then senator, Mr Kenneth McNeil, stated:

> "I believe that there should always be a right of appeal… I also believe that there can conceivably be cases where the time for appealing has passed and the person who has the right of appeal does not take advantage of his right because of something over which he has no control. I think that the Leader of the Opposition need not press me hard on them.. an Amendment that would give to any person wanting to appeal from the Resident Magistrate's Court and for whom time has run out but who can explain and give good reason why time has run out. I would certainly agree to the Law being amended to allow that person to come before the Appeal Court and for the Appeal Court to decide whether it is right and proper and that there is good reason given why time run [sic] out and therefore it can be heard."

[21] Mr Manley, at page 166, column 1 noted that in his experience, the giving of the notice of appeal and the lodging of the grounds of appeal were not considered to be "formalities" by the Court of Appeal. Accordingly, section 266 could not be applied to extend these times. In light of this, section 11(2) (now 12(2)) was added to empower the Court of Appeal to extend the time to file or serve notice and grounds of appeal.

[22] In support of including this power, Mr Manley stated at page 166, column 3:

> "A man may be driving with the grounds of appeal in his pocket and his car may overturn. He may be unconscious for a day or more and because of that he loses all his rights. The thing is utterly unfair that a man should be debarred

> because he has failed to take one step… I have known so many just cases where good appeals were denied because through no fault of the litigant, he had appealed in time but was one day late with his grounds of appeal."

Mr Manley lamented that section 266 of the JRMA had been narrowly construed by the courts to preclude the extending of time to file and serve the notice and grounds of appeal.

[23] In response, Mr McNeil agreed, stating that "if you are going to allow a man to go in who is late with his Notice of Appeal, that since Grounds of Appeal are also an integral part, and he can be denied his right, I suppose we might as well go the whole way".

[24] Counsel submitted that from the Hansard, it was clear that the legislature was "quite anxious that very little would preclude one's right to extend the time to file an appeal", and so included section 11(2) (now 12(2)) in the JAJA to extend the powers of appeal and not to diminish it. Echoing the sentiments of Mr McNeil, counsel maintained that going "the whole way" could not amount to preventing the extension of time to pay "a meager sum for due prosecution". It was clear that the purpose was that the powers of the court should be widened. When in the debate, she further submitted, it arose as to whether the terminology should read, "extend at any time" or "in keeping with the justice of the case", the decision was that the former would be more appropriate.

[25] Counsel also submitted that the Constitution of Jamaica gives each citizen a right to due process of the law, which arguably includes one's right to appeal. If the legislation (namely section 12(2) of the JAJA) were to be interpreted to exclude a prospective appellant merely because the sum for due prosecution had not been paid, this could arguably, counsel said, result in a fetter on the individual's right to due process. This, counsel reasoned, could not have been the intention of the legislature when it sought to widen the ambits of a citizen's right to appeal.

[26] Counsel relied on the case of **Aarons v Lindo** (1953) 6 JLR 205 in support of the application. In that case, the appellant lodged the sum for the due prosecution of the appeal two days after filing the notice of appeal. The Court of Appeal allowed the appellant to proceed with his appeal, treating the payment as a formality in respect of which the court had power to allow under section 269 of the Resident Magistrate's Law [the equivalent of JRMA, section 266].

[27] Counsel noted, however, that in **Christian v Brown** (1972) 12 JLR 1039, which was decided subsequently, it was held that payment for the due prosecution of the appeal was not a formality, but a condition precedent to the jurisdiction of the court.

[28] Counsel also relied on the dissenting opinion of Fox JA in **Patterson and Nicely v Lynch** (1973) 12 JLR 1241, as he stated that **Aarons v Lindo** was a correct statement of the law which had not been dissented from for over a period of two decades.

[29] Counsel therefore concluded that the gravamen of the matter was not whether the requirement for the payment of the sum was a "condition precedent" or a "formality"; instead the decisive factor or focus should be on the aim or the ethos of the legislation, (namely the JRMA and the JAJA) which was to extend the powers of appeal. It was not intended, counsel submitted, to prevent a citizen from having his appeal heard because the time could not be extended to file sums relative to the due prosecution of the appeal.

Submissions of counsel for the respondent

[30] Counsel for the respondent argued that section 12 (2) of the JAJA does not grant the court any discretion to extend the time for which the sum of $600.00 can be lodged. Thus, the court does not have the power to do so, and the application should be dismissed. The provision granted the court the discretion for extending the time in respect of three other actions and thus the intent of the legislature must be respected. Counsel referred to **Aarons v Lindo**, but submitted that since then the courts have ruled on several occasions to the contrary. She referred to **Christian v Brown**, **Welds v Montego Bay Ice Co. Ltd**, **and Smith** (1962) 5 WIR 56 and, in particular, **Patterson and Nicely v Lynch**, where she submitted that the court had held that:

> "...the requirement as to the deposit for the due prosecution of an appeal from a resident magistrate's court at the time of taking or lodging the appeal was a condition precedent to the jurisdiction of the Court of Appeal, and this court had no power to reset the timetable regulating the conduct of appeal proceedings so as to enable that requirement to be complied with at a later date."

[31] Counsel for the respondent referred to the fact that counsel for the applicant repeatedly referred to the amount for the due prosecution of the appeal as a "meager sum" and one that could not have been intended to be a "roadblock to any litigant wishing to lodge an appeal". Counsel for the respondent indicated that she shared that view, as, "there can be no contention that due process under the law has been denied to anyone as a result of the requirement for the payment of this 'meagre' sum. This is intended and always has been a very 'meager' deposit fee in order to ground the jurisdiction of the court". Counsel submitted that as a consequence, no litigant would be precluded access to the courts, and as the Legislature has not seen it fit to amend this requirement, this court, "ought not to seek to confer upon itself the power to do so". Counsel submitted further that since the applicant had failed to comply with section 256 of the JRMA, and the time could not be extended in order for the applicant to comply with the said provision, there is no appeal and the application should be dismissed.

Discussion and Analysis

[32] In order to fully appreciate the issue, it is necessary to briefly consider the relevant legislative history in relation to the power given to the appellate court to grant extensions of time in civil appeals from the Resident Magistrates' Court.

[33] The Judicature (Appellate Jurisdiction) Law 1962 made provision for the jurisdiction and powers of the Court of Appeal and other incidental matters. Section 11 of the Act, as it stood then, indicated that subject to the provisions contained therein and of the Judicature (Resident Magistrates) Law regulating appeals from the Resident Magistrates' Courts in civil proceedings and rules made under that law, appeals from

any judgment, decree or order from the Resident Magistrates' Courts would lie to the Court of Appeal, in all civil proceedings, and the Court of Appeal could extend the time, at any time, for giving notice of appeal or filing grounds of appeal.

[34] Section 17 of Act 33 of 1965, the Judicature (Resident Magistrates) (Miscellaneous Provisions) Act, 1965, (which was an Act to extend the jurisdiction of the Resident Magistrates' Courts and to make other miscellaneous amendments of certain laws relating thereto) amended section 11(2) of the Judicature (Appellate Jurisdiction) Law 1962 to insert the words "or security for the costs of appeal" after the words "notice of appeal". This amending Act of 1965 was, however, not brought into operation until 12 September 1967. After the amendment, section 11 (2) would then have read:

> "11 …
>
> (2) The time within which notice of appeal or security for the costs of appeal, may be given or grounds of appeal may be filed in relation to appeals under this section may be extended at any time by the Court."

[35] Section 3 of Act 12 of 1970 (which was an Act to Amend the Judicature (Appellate Jurisdiction) Law, 1962) repealed section 11(2) above and substituted the now existing section 12(2) (see paragraph [16]).

[36] The interpretation of the legislation which ultimately led to the provisions of section 12(2) has had a long history through the courts, which is interesting, and I found that the history, once properly traced, shows how certain aspects of these provisions could have been misinterpreted, misread and misunderstood, and the time

has come perhaps for the court to have another look at the case history in the light of the legislative developments over the years.

[37] In **Jamaica Mineral Waters Co Ltd v the Kingston and St. Andrew Corporation** (1936) 3 JLR 10, the court reviewed section 260 of the Resident Magistrate's Law which required an appellant to serve on the respondent and file with the clerk of courts the grounds of appeal within 10 days of receiving the reasons for the Resident Magistrate's judgment. Like JRMA section 256, section 260 of the Resident Magistrate's Law provided that "on his failure to do so his right of appeal shall cease and determine". The Court of Appeal held that the requirement to file and serve grounds of appeal was a condition precedent to the perfection of a civil appeal from a Resident Magistrate's Court, and that failure to do so had resulted in a cessation of the right of appeal which could not be cured by the court. It is clear from that judgment that a right which had "ceased and determined" could not be extended by the court in the absence of a special power to do so.

[38] Two years later in **Rex Ats Hurter v Hunter** (1938) 3 JLR 111, the Court of Appeal held that the giving of the notice of appeal was a condition precedent to an appeal, and not a formality. Furness CJ accepted the view of Lord Alverstone in **Rust (app) v Churchwardens of St. Botolph, Bishopsgate (Resp)** 94 LTR 575 that "in the interests of Justice and the uniformity of business… persons must obey those conditions [that is, the serving of the notice of appeal] before they are entitled to have their appeals heard".

[39] **Hurter v Hunter** was relied on in **Willocks v Wilson** (1944) 4 JLR 217, where Savary CJ (Ag) held (at page 218) that the giving of a bond for security for the costs of the appeal within the 14 day time limit is a "condition precedent to the jurisdiction of the Court to hear an appeal, in other words, it is one of the conditions which have to be satisfied within the period fixed by law before a right exists in an appellant to have his appeal heard".

[40] The issue of failure to make payment for the due prosecution of the appeal seemed to have arisen initially for the specific and separate attention of the courts in **Aarons v Lindo**. As indicated previously, the appellant had filed notice of appeal on 27 November 1952, and lodged the sum for the due prosecution of the appeal two days later on 29 November 1952. There was a preliminary objection to the hearing of the appeal on the basis that the sum for the due prosecution of the appeal had not been paid "at the time of taking or lodging the appeal". This was rejected by the Court of Appeal. O'Connor CJ delivered the judgment of the court at page 205 and stated:

> "We are of opinion that the requirement that the payment of the sum of ten shillings shall be made at the same time as the taking or lodging of the appeal is a formality and that this Court has power under (s. 269) to allow the appeal to be heard. In the circumstances of the case, we are of opinion that the appellant should be allowed to proceed with his appeal."

[41] No reasons were given in the judgment to justify characterizing the payment for due prosecution as a "formality". However, the court would have been cognizant of previous decisions where the serving of the notice and grounds of appeal, and the payment of security for costs were held to be conditions precedent. In fact, Cluer JA

was on the panel in both **Willocks v Wilson** and **Aarons v Lindo**. The court in **Aarons v Lindo** did not depart from the previous classification of the lodging and service of the notice and grounds of appeal and the payment of security for costs as "conditions precedent", but simply characterized payment for the due prosecution of the appeal (a separate step) as a "formality". This was a very important step in the judicial debate.

[42] The view held in **Aarons v Lindo** was approved in **Rochester v Chin and Matthews** (1961) 4 WIR 40 where the appellant failed to serve notice of appeal on the respondent. The court of Cools-Lartigue, Semper and Duffus JJ, held, in a judgment delivered by Cools-Lartigue J, at pages 41-42 that:

> "… it has been the practice of this court to apply the provisions of s 266 … when there have been omissions regarding the preparation and service of the grounds of appeal if it has been shown that the conditions laid down in that section should be applied. This has been done in all cases where the omissions have been shown to be formalities … see **Aarons v Lindo** (1953) 6 JLR 205).
>
> No case has been drawn to our attention where this court has decided that the service of notice of appeal is a formality."

[43] The court upheld a preliminary objection that the court had no jurisdiction to hear the appeal, the notice of appeal having been served on the respondent outside of the 14 day period permitted by the Act and, on the basis that the court had no power to extend or enlarge the time. The court expressed the view that the giving of a notice

of appeal "is a condition precedent, the performance of which founds the jurisdiction of the court of appeal to hear the appeal".

[44] What was of some significance, however, was that the cases of **Willocks v Wilson** and **Hurter v Hunter** were also considered in **Rochester v Chin**, and the court found no conflict whatsoever between the view that service of the notice and grounds of appeal, and the giving of security for the costs of the appeal were not formalities, and the view that the payment for due prosecution of the appeal was a formality.

[45] Subsequent to this, **Welds** was decided. In this case there were two appellants, but a sum in respect of security for costs was given for one appellant instead of for each appellant, as required by section 256 of the JRMA. A preliminary objection had thus been taken successfully, that a condition precedent to establish jurisdiction in the court had not been complied with. It had been submitted for the respondent that section 11(2) of the Judicature (Appellate Jurisdiction) Law was silent as to any power to grant an extension of time in relation to the giving of security for the costs of the appeal, and if the legislature had so intended it would have clearly expressed its intention, which could not be implied. The Court of Appeal indicated that it had carefully examined all the previous decisions of the court, which had been reviewed in **Rochester v Chin**, and reiterated that section 11(2) only gave the court the power to extend the time for the giving of the notice of appeal and the filing of the grounds of appeal. Payment of security for costs was still a condition precedent to the founding of

the jurisdiction of the court and there was no power to treat it as a formality under section 266. However, Phillips P (Ag), in delivering the decision of the court, stated that "of course, if in any case the court extended the time for giving notice of appeal, it would follow as a necessary result, that the time for giving security for costs would automatically be extended to 14 days from the time limited for giving notice of appeal".

[46] It seems clear to me that this decision, may have encouraged the amendment to the JAJA which was brought about as indicated herein, firstly by Act 33 of 1965 and then later by Act 12 of 1970, the Judicature (Appellate Jurisdiction) (Amendment) Act. The 1970 amendment resulted in what is now section 12(2) of the JAJA, which empowers the Court of Appeal to extend the time for: (a) giving or serving the notice of appeal; (b) giving security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal; and (c) filing or serving grounds of appeal.

[47] At the time of the amendments in 1965/1967 and 1970, there was no decision in any case which had indicated that the payment for the due prosecution of the appeal could not be treated as a formality, and for which the court did not therefore have the power to deal with by virtue of the provisions of section 266. Indeed, the cases were to the contrary. The due prosecution of the appeal was clearly considered a "formality' not founding any jurisdiction of the court.

[48] **Christian v Brown** appears to have been a turning point in this area of the law. The case was decided after the Judicature (Appellate Jurisdiction) (Amendment) Act,

which introduced section 12(2). There, the Court of Appeal considered its jurisdiction to extend time to pay security for the due prosecution of the appeal under the JRMA and the JAJA. However, the court appeared to follow the ratio decidendi in **Welds**, which dealt with the issue of the payment of security for costs which had over the years always been treated differently by the authorities and the legislature in the promulgation of the amendments. Henriques P in delivering the judgment of the Court stated:

> "The question which arises for consideration is whether or not the payment of the one dollar for the due prosecution of the appeal can be said to be a formality in respect of which the court can exercise its power under s 266. The answer to that question seems to lay [sic] in the case of **Welds v Montego Bay Ice Co and Smith**."

The court stated that the particular omission in the Amendment Act of 1970, with regard to the sum for the due prosecution of the appeal "cannot be treated as a formality". The court reviewed the statute before the 1970 amendment and after and concluded that the amendment had been brought about by **Welds** and stated:

> "It appears to us that it might very well have been an omission on the part of the legislature not to include in that amendment provisions dealing with the extension of time within which payment of the one dollar for the due prosecution of the appeal might be made. This is a situation which ought to be remedied."

[49] What is of significance is that **Christian v Brown** followed and adopted the principles in **Welds** despite the fact that the latter was a case dealing with the payment of security for costs, which had never been considered "a formality" in the decisions which preceded it, but "a condition precedent", as against the question of the payment

for the due prosecution of the appeal, which had previously only been considered "a formality".

[50] Some months later, the reasoning in **Christian Brown** was followed in **Patterson and Nicely v Lynch**, where there were two appellants, but only $1.00 (instead of $2.00) had been paid for the due prosecution of the appeal.

[51] In delivering the majority judgment, Luckhoo JA, reviewed all the cases and recognized that **Aarons v Lindo** had not been adverted to the court in **Christian v Brown**, and also had not been adverted to the court in **Welds**, which formed the basis of the decision in **Christian v Brown**. Further, **Rochester v Chin** was also not referred to the court in **Christian v Brown**. The court recognized that since at least 1953, the requirement for the due prosecution of the appeal had been treated as a formality. The court was also of the view that the omission of the provision from the amended legislation was not due to an omission as stated in **Christian v Brown**, but was deliberate, and a recognition of the decision in **Aarons v Lindo**. However, the court thought that that could not affect the proper interpretation to be accorded to the provisions in the JRMA, particularly if the ruling in **Aarons v Lindo** was wrong. Luckhoo JA concluded (at page 1245):

> "… it is necessary to consider what consequences would flow should there be a failure to make the required deposit. It is only upon the requirements mentioned in the first paragraph of s. 256 being complied with, and these include the deposit of the sum of one dollar by each party appealing, that the trial magistrate is obliged to draw up for the information of the Court of Appeal a statement of his reasons for the

> judgment, decision or order appealed against. Thereafter such statement must be lodged with the clerk of court who is required to give notice thereof to the parties. The next step in the proceedings is that the appellant is required within twenty one days after the day he receives such notice to draw up and serve on the respondent and file with the clerk of the court the grounds of appeal and on his failure so to do his right of appeal shall, subject to the powers given [sic] the court by s 266, cease and determine. It will readily be seen that the fourth, fifth and sixth paragraphs of s 256 provide a timetable regulating the conduct of the appeal proceedings and that due compliance with each of the requirements prescribed in the first paragraph of that section is a condition precedent to the appeal proceeding eventually being lawfully perfected. It can hardly, therefore, be said that any of those requirements is a formality whereby the court may admit the appellant to impeach the judgment order or proceedings appealed from. It is only by virtue of the provisions of s. 11(2) of the Judicature (Appellate Jurisdiction) Law, 1962 as repealed and re-enacted by s. 3 of the Amending Act of 1970 that the Court of Appeal may reset the timetable regulating the conduct of the appeal proceedings and unfortunately no provision is made therein in the case of failure to comply with the requirement that a deposit be made for the due prosecution of the appeal.
>
> I would hold that the ruling given in **Aarons v Lindo** is wrong and that the court in **Christian v Brown** came to the right conclusion."

[52] However, Fox JA was not so convinced. He also traced the legislative history and the cases decided by the Court of Appeal over the years. He stated clearly that in his opinion, when Act 12 of 1970 was enacted and section 12(2) of the JAJA replaced the earlier provision of section 11(2), as **Aarons v Lindo** had been in existence for over 17 years and had not been dissented from, but, on the contrary, had been consistently treated as a correct statement of the law, then:

> [There was] every justification for the view that with the passing of Law 12 of 1970 the legislature believed that the four obligations of notice and grounds of appeal, and the giving of security for costs and due prosecution of the appeal placed upon an appellant by s. 256 of the Law were now safely secured once and for all time within the discretionary power of the Court of Appeal, and that for the purpose of the exercise of this power, the distinction between 'formality' and 'condition precedent' which had been first adumbrated in the **Jamaica Mineral Waters** case would no longer bedevil judicial endeavour to do substantial justice between the parties to a cause."

[53] He therefore held that the decision in **Christian v Brown** was given *per incuriam,* and should not be treated as a binding precedent.

[54] Fox JA agreed with the view of Luckhoo JA that the omission in the amended JAJA and in relation to the provisions empowering the extension of time for giving security for the due prosecution of the appeal, was "deliberate, and in recognition of the decision in **Aarons v Lindo** and not the result of an oversight". In his opinion, though, the decision in **Aarons v Lindo** was correct because:

> "1) Section 256 of the Law does not expressly make the right of appeal dependent upon the steps required of an appellant by its provisions
>
> 2) For the purpose of construing the provisions of s. 256, the judicial distinction, which was initially made in the **Jamaica Mineral Waters** case between 'formalities' and 'conditions precedent' was unnecessary and at no time within the contemplation of the legislature as the history of the relevant amending legislation shows.
>
> 3) In appeals from decisions of a resident magistrate, there is no compulsion of urgency such as exists for example with respect to the presentation and service of an election petition under the Election Petition Laws … or any other

> compulsion which demanded that the right of appeal should be made dependent upon a strict compliance of conditions as to time.
>
> 4) The deposit of security for due prosecution of an appeal can have no effect on the substantive rights of the parties. It is returnable in any event if the appellant appears before the Court of Appeal, and by being merely a penalty for failure duly to prosecute the appeal is entirely a matter of procedure."

[55] Fox JA concluded with the observation that:

> "There is one further point, which shows conclusively that extension of time for the deposit of security for the due prosecution of the appeal was intended by the legislature to be within the discretionary power of the court. The deposit is to be made 'at the time of taking and lodging the appeal', and since the court is empowered to extend this latter time, it follows, a *fortiori*, that the court must also have the power to extend the time for the deposit of security."

[56] I must say that the views held by Fox JA are compelling and very persuasive for the following reasons:

1. Section 266 of the JRMA envisages a liberal construction of the Act in favour of the right of appeal which arises under section 251. As indicated previously, section 266 makes it clear that this court can, if satisfied that any formality required to be done is not done due to inadvertence or from ignorance or necessity, and if the justice of the case requires it, permit the appellant to impeach the judgment with or without terms.

2. The extracts from the Hansard although of limited assistance in the construction of statutes (vide **Pepper (Inspector of Taxes) v Hart**

[1193] AC 593), indicate that the intention of the amendments in 1962 which dealt with the extension of time for the giving of the notice of appeal and the service of the grounds of appeal was for the powers given to the appellate court with regard to the perfection of civil appeals from Resident Magistrates' Court to be wide to facilitate the validity of the appeal and not to frustrate the right of the litigant.

3. The court in **Christian v Brown** erroneously relied on **Welds**, as **Welds** concerned the payment of security for costs, and not payment for the due prosecution of the appeal, the former being always treated as a condition precedent and the latter as a formality. The two payments are directed to entirely different purposes, the latter even being refundable if the appellant attends in person in support of his appeal, and this is so regardless of the outcome of the appeal.

4. All the judges in **Patterson and Nicely v Lynch** were of the view that the omission in the 1970 amendment was not an omission due to oversight, but was a deliberate act of the legislature. Yet in spite of the fact that the 1970 amendment had been passed, at a time when the cases would have indicated that there was no need to express any protection for the payment of the sum for the due prosecution of the appeal, as it was a formality, and protected by section 266 of the JRMA, the majority of the court proceeded to rule that **Aarons v Lindo** had been wrongly decided, and determined that the payment of security for

> the due prosecution of the appeal was a condition precedent to the jurisdiction of the court. In doing so, they removed payment of the sum for the due prosecution of the appeal from the protection of section 266 of the JRMA with the result that it did not have the protection of the amended statute thereby creating a distinct and unfortunate anomaly.

[57] On the basis of all of the above, it may well be said that the view taken by the majority in **Patterson and Nicely v Lynch**, characterizing the deposit as a condition precedent, after the amendment had been enacted in 1970 may not have been in keeping with the development of the legislation or the case law leading up to it, may not be in the interests of justice and is therefore potentially flawed. The question would then arise as to whether it should be considered a binding precedent on this court, or a decision should be taken that it should no longer be followed. Indeed, this was the thrust of Miss Samuels' application and her submissions before this court.

[58] There is no doubt that while this court is required to observe the doctrine of *stare decisis*, it may depart from its previous decision in limited circumstances. In **Thorpe v Molyneaux** (1979) 16 JLR 295 Carberry JA considered at length the issue of whether this court is permitted to depart from its previous decision. The court in that case was faced with the issue of whether to follow its previous decision in **Elliott v Elliott** (1945) 4 JLR 244 even though it was of the view that that case had been wrongly decided. Carberry JA considered whether the approach of the English Court of Appeal as enunciated in **Young v Bristol Aeroplane** [1944] 2 All ER 293 had been adopted by the Jamaican Court of Appeal (viz, that the Court of Appeal would only

depart from its previous decision where there are two previous conflicting decisions; where the previous decision conflicts with that of the final appellate court; or where the previous decision was given per incuriam). After an extensive review of the authorities, he said (page 332):

> "…*What is in issue is whether the Court will follow its previous decision even when it thinks that decision is wrong* on the ground that it is irrevocably bound thereby, and only the decision of a Higher Court or an Act of the Legislature can correct an admittedly wrong decision, (leaving aside for the moment the possibility of putting the decision under the rubric of one of the exceptions in the **Bristol Aeroplane** case). In my opinion the rule in ***Young v Bristol Aeroplane Company*** is a rule of practice that does not form part of the common law received into Jamaica … I am of opinion that the doctrine of stare decisis as practised by the Privy Council, (our final Court of Appeal), and now by the House of Lords, and by the High Court of Australia should be and remain our guide. **This court should reserve the power to correct its own mistakes and to refuse to follow previous decisions when they are manifestly wrong, and it is in the public interest that they should be corrected**.*"*(emphasis mine)

Then at page 333, he concluded:

> " I think that we are entitled … to hold that the decisions of the Old Court of Appeal while entitled to our greatest respect are not binding upon this Court. I am also of opinion that this Court has not adopted the rule of practice laid down for the English Court of Appeal in ***Young v Bristol Aeroplane Co*** and that we should reserve the right to review our own previous decisions and to correct them where they are clearly wrong."

Although the court in **Thorpe v Molyneaux**, being a post-independence court, was faced with following a pre-independence Court of Appeal decision, Carberry JA was quite clear in his pronouncement that the jurisdiction of the Court of Appeal to depart from its previous decisions was not limited to circumstances where the decision was one of a pre-independence court. This court again in **Collector of Taxes v Winston Lincoln** (1987) 24 JLR 232 applying the dictum of Carberry JA also declined to follow its previous decision.

[59] I am therefore of the view that this court could overrule **Patterson and Nicely v Lynch** and apply **Aarons v Lindo**, if it were satisfied that the former decision was manifestly wrong, and it is in the public interest that it should not be applied.

[60] I am also of the view that it would be in the public's interest if **Aarons v Lindo** were followed inasmuch as the application of **Patterson and Nicely v Lynch** has shut out many meritorious appeals. Phillips P (Ag) in **Welds** expressed the view that if an extension of time is permitted for the giving of the notice of appeal, then the time for the payment of the sum for security of costs would also be extended. Fox JA in **Patterson and Nicely v Lynch** stated that if the court can extend the time for the filing of the notice of appeal, then the court would have the power to extend the time for the payment of the sum for due prosecution insofar as this sum is to be paid at the time of the taking or lodgment of the notice. However, the court cannot grant the extension of time for the payment of the sum for due prosecution in and of itself. The injustice which is therefore meted out by the application of **Patterson and**

Nicely v Lynch is that regardless of the merits of his appeal, a prospective appellant would be precluded from pursuing his appeal where the notice of appeal has been filed and lodged without the requisite $600.00. The injustice is compounded by the fact that each litigant has the right to one appeal only and once the appeal is accepted as being properly filed by the court registry, it may not be withdrawn and refiled as the right would have been spent.

[61] However, the public interest in certainty in the law may perhaps not be served by such a development. This is particularly so when it is considered that this present appeal concerns a question of construction of a statute, which in very many cases depends on the approach adopted (for instance a literal vs a purposive approach). As was said by Lord Reid in **Jones v Secretary of State for Social Services** [1972] 1 All ER 145, "construction so often depends on weighing one consideration against another". Although Fox JA's position is compelling, it cannot be said that the view of the majority as expressed by Luckhoo JA was any less compelling. The different conclusions arrived at were as a consequence of the application of two different approaches to statutory construction. The matter of the meager amount to be paid aside, there is nothing in the clear words of section 256 which indicates that the payment of the sum for due prosecution is of any less significance than the other steps the litigant is required to take in prosecuting his appeal. It cannot therefore be said that the view of the majority was manifestly wrong. To borrow from the words of Lord Pearson in **Jones** "If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal,

then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be lost".

[62] It must also be considered that **Patterson and Nicely v Lynch** has been in existence for over 40 years, during which time it has been applied consistently in several decisions - see **Wilbert Christopher v Attorney General of Jamaica**, RMCA Motion No 26/2001, delivered 9 November 2001 and **Jacqueline Archibald v Lester Roberts** Application No. 79/2007, delivered on 20 December 2007. Certainly, it is easier to overrule a previous decision that is very recent than one that has been in existence for a very long time, as in the latter case, a great many litigants would have acted upon it or would have been precluded from acting because of it.

[63] It is my view therefore that while the application of **Patterson and Nicely v Lynch** may have caused much injustice, this would not be an appropriate case for this court to depart from that decision as it cannot be said that that decision was manifestly wrong nor would it be wholly in the public interest to overrule it. This notwithstanding, unjust results may continue to be occasioned by the application of section 256 as presently worded, particularly where the appellant is unrepresented. It is now time therefore for the legislature to put matters right and enact the appropriate amendment to the Act to bring into effect what it had clearly hoped to achieve by the amendment in 1970.

[64] Had this matter related only to an application for extension of time to pay the sum for the due prosecution of the appeal, this would necessarily have resulted in a

refusal of the application. However, the application before us requested an extension of time for filing the notice of appeal and the payment of the sum for due prosecution. In this case, the Resident Magistrate's Court refused to accept the notice of appeal, which was fortuitous to the applicant as there was then no appeal filed in relation to this matter. Rule 12(2) permits this court to grant an extension of time to file the notice of appeal. The factors to be considered by this court in the exercise of its discretion are well-known – see **Jamaica Public Service v Rose Marie Samuels** [2010] JMCA App 23. The court must consider the reason for the delay in filing the notice, the merits of the proposed appeal and any prejudice to be suffered as a result of the grant of the extension of time. The appeal was filed in time but was returned, and, as counsel for the applicant deposed, it was only after the time had expired for the filing of the notice of appeal that the registry at the Resident Magistrate's Court in Brown's Town informed her of the reason for its refusal of the notice, at which point, it would have been too late to properly file the appeal without getting an extension of time. It seems to me that in those circumstances, the failure to properly file and lodge the appeal could not be said to be entirely the fault of counsel.

[65] Although the details in relation to the substantive matter are sparse, it appears that the applicant's claim in the court below had been for the return of monies he had spent in maintaining a child whom he had mistakenly believed to be his biological offspring. The applicant has submitted that the learned Resident Magistrate erred in the test she applied to arrive at her decision, namely, that because he had a suspicion that the child was not his, that meant that he knew that the child was not his and, so

any monies spent on that child, should not be returned to him. No information was placed before the court opposing these grounds of appeal as the respondent chose to rely on the legal issues set out in this judgment. It is arguable that in arriving at that decision, suspicion of non-paternity was equated to proof of non-paternity. If this is so, this raises the issue of whether this was the correct standard to be applied. It would then be necessary to consider whether the Resident Magistrate ought to have decided the matter on whether the applicant had in fact had proof that the child was not his biological child at the time the payments were made. Thus, I think, raises an arguable appeal.

[66] The respondent has put forward no evidence of any prejudice she would suffer if the application were to be granted. I therefore consider this to be an appropriate case for the exercise of the court's discretion to extend the time and would grant the application for the extension of time to file the notice of appeal. Having granted that extension, there is no need, at this time, for an extension of time to pay $600.00 as security for the due prosecution of the appeal, for as stated previously, section 256 of the JRMA indicates that that sum shall be deposited in the court "at the time of taking or lodging the appeal". The notice of appeal should therefore be filed within 14 days of the date hereof, with the required deposit as mentioned above, and within 14 days thereafter, the required further payment in respect of the security for the costs of the appeal should be made.

McINTOSH JA

[67] I too have had the opportunity of reading in draft the judgment of my sister Phillips JA and agree that this application should be granted, permitting the applicant to file his notice and grounds of appeal within 14 days of the Order herein at which time the payment should be made of the required sum for the due prosecution of the appeal.

[68] I have also had the opportunity to read the opinion of my brother Morrison JA in relation to the issue of whether the court has power to extend the time for the payment of the sum for the due prosecution of the appeal and I am led to the view that perhaps some legislative action may well be needed to bring some certainty to this area relating to the procedure for appeals from the Resident Magistrates Court. It seems to me that the Hansard extracts referred to (see paragraphs [19] – [23] and [56] above) show an intention by the participants in the debate to remove all obstacles from the intending appellant so as to enable an unencumbered exercise of his/her single right of appeal and a timely intervention by Parliament would lay this matter to rest.

MORRISON JA

ORDER:

> Application for extension of time to file notice of appeal is granted. The period for filing the notice is extended to 14 days from the date hereof. Costs of the application to the respondent.