

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 19/2016

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA**

APPLICATION NO 43/2016

BETWEEN	NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED	APPLICANT
AND	BAILEY TERRELONGE ALLEN (A FIRM)	RESPONDENT

APPLICATION NO 78/2016

BETWEEN	BAILEY TERRELONGE ALLEN (A FIRM)	APPLICANT
AND	NATIONAL TRANSPORT CO-OPERATIVE SOCIETY LIMITED	RESPONDENT

**Oswest Senior Smith, Mrs Denise Senior Smith and Mrs Tosya Francis-Lindo
instructed by Austin L Francis & Co for National Transport Co-Operative
Society Limited**

**Alando Terrelonge and Miss Trisha Ann Brown instructed by Bailey
Terrelonge Allen for Bailey Terrelonge Allen**

7 and 10 November 2016

ORAL JUDGMENT

MORRISON P

[1] This is the judgment of the court.

[2] The National Transport Co-Operative Society Limited (NTCS) was for some considerable time represented by Bailey Terrelonge Allen (BTA), a firm of attorneys-at-law. This matter concerns a judgment of Campbell J (the judge) given on 18 December 2015, in which the judge (a) refused an application by BTA for a charging order; but (b) granted BTA's application for an interim declaration that it is entitled to a lien in the sum of \$162,125,688.35 on funds to which NTCS is entitled. The basis of the claim to a lien is a contingency fee agreement purportedly made between NTCS and BTA on 7 March 2001 (the contingency agreement).

[3] On 26 January 2016, BTA filed an appeal (SCCA No 11/2016), challenging the judge's failure to grant a charging order over the said sum of \$162,125,688.35.

[4] On 12 February 2016, NTCS filed an appeal (SCCA No 19/2016), challenging, among other things, the judge's grant of the interim declaration that BTA is entitled to the lien, as mentioned above.

[5] It is common ground that SCCA No 19/2016 was filed 12 days after the expiration of the 42 day period limited by the Court of Appeal Rules 2002 for the filing of civil appeals. Accordingly, NTCS now seeks an order extending the time for the filing of SCCA No 19/2016 to 12 February 2016, the date of its actual filing, while BTA seeks an order striking out the appeal on the ground of its having been filed out of time. The reason given by NTCS for the late filing is that its attorney-at-law miscalculated the period within which the appeal should have been filed, given the recent amendment to the Civil Procedure Rules 2002 in September 2015. NTCS also submits that the

proposed appeal is one with a good prospect of success, in that (a) in granting the declaration, the judge made various errors of law, and/or exercised his discretion wrongly; and (b) fresh evidence has been discovered, indicating that the contingency agreement was a forgery (the fresh evidence).

[6] The issue of the fresh evidence has also been raised by NTCS in SCCA No 11/2016, which remains pending before the court. NTCS also seeks an order consolidating the two appeals.

[7] BTA opposes the application, principally on the ground that the proposed appeal has no reasonable prospect of success, in particular because the so-called fresh evidence is unlikely to satisfy the established test for the admission of fresh evidence in this court.

[8] The parties are agreed that the test for the grant of an extension of time is that set out by Panton JA (as he then was) in **Leymon Strachan v The Gleaner Co Ltd** (Motion No 12/1999, judgment delivered 6 December 1999), by virtue of which the relevant considerations are: (i) the length of the delay; (ii) the reasons for the delay; (iii) whether there is an arguable case on appeal; and (iv) whether there will be any prejudice to other parties should an extension be granted. Even if no good reason is proffered for the delay, the court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done.

[9] In this case, it seems clear that: (i) the period of delay cannot be said to be inordinate; (ii) the reason for the delay advanced by NTCS' attorney-at-law is, on the

authorities cited to the court, acceptable (see, for instance, **Vidale v Mayor, Aldermen and Citizens of Port-of-Spain** (1968) 13 WIR 299, 304, per Fraser JA; and **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49, per Phillips JA at paragraphs [44] and [49]); and (iii) nothing has been put before the court to suggest that there will be any great prejudice to BTA if the extension is granted.

[10] The only remaining question, therefore, albeit perhaps the most important one, is whether NTCS has an arguable case on appeal. It seems to me that, if at all, the proposed appeal is only marginally so, since the debt in respect of which the order declaring the lien was made has previously been acknowledged, and in fact paid in part, by NTCS. Further, it is open to doubt whether the so-called fresh evidence can significantly avail NTCS at this stage of the proceedings, there being no guarantee that an application to admit it in evidence will ultimately be successful.

[11] But we are nevertheless persuaded that, in the unusual circumstances of this case, NTCS should be granted the extension of time which it seeks. In this regard, we cannot ignore the fact that the very question which is in issue in SCCA No 19/2016 is also in issue in SCCA No 11/2016. It therefore seems to us to be desirable, in the interests of justice and of achieving finality on the status of the contingency agreement, that SCCA No 19/2016 should be allowed to go forward and to be heard at the same time as SCCA No 11/2016.

[12] We therefore (i) grant NTCS' applications for extension of time and consolidation, as amended (Application No 43/2016), with costs to BTA, to be taxed if not agreed; and (ii) dismiss BTA's application (Application No 78/2016) to strike out SCCA No 19/2016, with no order as to costs.