

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)**

RESIDENT MAGISTRATES CIVIL APPEAL NO 6/2016

APPLICATION NO COA2020APP00042

BETWEEN	MANNASEH THOMAS (ADMINISTRATOR OF THE ESTATE OF GERALD THOMAS)	1ST APPLICANT
AND	GERALD THOMAS (ADMINISTRATOR OF THE ESTATE OF GERALD THOMAS)	2ND APPLICANT
AND	NORANDA JAMAICA BAUXITE PARTNERS	RESPONDENT

Written submissions filed by Oswest Senior Smith & Co for the applicants

Written submissions filed by Glenford P Watson for the respondent

8 April 2022

F WILLIAMS JA

[1] I have read the draft judgment of my sister, Brown Beckford JA (Ag), and agree with her reasoning and conclusion and have nothing to add.

V HARRIS JA

[2] I agree and have nothing to add.

BROWN BECKFORD (AG)

Background

[3] On 31 January 2020, the applicants filed a notice of motion for conditional leave to appeal to Her Majesty in Council ('the notice of motion') from a decision of this court handed down on 17 January 2020 with affidavit of Gerald Thomas in support. The notice of motion was not served on the respondent at the address stated in it but was served on its attorneys-at-law on the record on 19 February 2020. The applicants also filed an application for extension of time to serve the notice of motion. The matter came before a single judge of this court who directed, among other things, as follows:

"1. Given that the Motion was not served within the time limited for it to be **filed and served**, it would seem that an application for extension of time will have to be placed before the court for consideration. Please have the parties prepare to argue the application before the court. The court ought to be satisfied that it has the power to extend time for service of the motion to be effected." (Emphasis supplied)

[4] Therefore, the application for extension of time came before this court for consideration. The parties also complied with the requirement to file written submissions. At the request of the applicants, and with no objection from the respondent, this application is being considered solely on those written submissions.

[5] The process to be utilised in initiating an appeal to the Privy Council is governed by section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 ('Order in Council'), which stipulates as follows:

"3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment appealed from, and the applicant shall give all other parties concerned notice of his intended application."

[6] The relevant chronology for this application is this:

- 1) 17 January 2020 - decision of the Court of Appeal.

- 2) 31 January 2020 – notice of motion filed.
- 3) 19 February 2020 – respondent’s attorney-at-law served with the notice of motion and supporting affidavit.
- 4) 27 February 2020 – notice of application for extension of time to serve the notice of motion filed.

[7] Before addressing the substance of this application, a preliminary point arose for our consideration which has been resolved without the need for judicial determination.

Was there a valid notice of motion?

[8] By way of emailed correspondence to the parties, the registry indicated that it did not have a stamped copy of the notice of motion filed on 31 January 2020 or affidavit in support of same on the file. Accordingly, the registry by that missive requested a copy of the stamped notice of motion and a copy of the official receipt in proof that the notice of motion had been duly stamped in accordance with Part 3 of the Civil Procedure Rules, 2002 (‘the CPR’) (which is applicable to this court by virtue of rule 1.1(10)(f) of the Court of Appeal Rules (2002) (‘CAR’)). Rule 3.7(3) of the CPR states as follows:

“(3) Where a fee is to be paid a document is not to be treated as filed until –

(a) the fee is paid; or

(b) an undertaking to pay the fee acceptable to the registrar is received.

[9] Counsel for the applicants supplied a copy of the notice of motion but not a copy of the receipt from the Stamp Office. Further requests were made, but at the time this application came on for hearing, neither a copy of the receipt nor stamped copy of the notice of motion had been supplied to the registry. This court held in **Chas E Ramson Ltd and Another v Harbour Cold Stores Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1978, judgment delivered on 27 April 1982, that it did

not have the authority to extend the time for filing the notice of motion. This position has been subsequently applied by this court in several cases (see, for example, **Exclusive Holiday of Elegance Limited v ASE Metals NV** [2014] JMCA App 2 (**Exclusive Holiday**) at para. [10] and **Fritz Pinnock and Ruel Reid v The Financial Investigations Division** [2021 JMCA App 29 at paras. [71] – [83] (**Pinnock and Reid v FID**)). It would be fatal to the applicants if the notice of motion had not been stamped with the applicable fees at the time it was filed as no undertaking to pay the fee had been given to the registrar. And, in any event, any such undertaking would entail the payment of the requisite stamp duty within the time provided for the filing of the notice of motion (21 days)(see paras. [137] and [138] of **Pinnock and Reid v FID**).

[10] On confirmation that a stamped notice of motion along with supporting affidavit had been received at the registry on 31 January 2020, subsequent and more thorough checks in the registry resulted in locating the notice of motion with proof of payment of the stamp duty, as required by The Court of Appeal Rules (Fees) (Amendment), 2017, made pursuant to The Judicature (Rules of Court) Act, and the affidavit in support filed on the same date.

[11] There being a valid notice of motion filed within the time stipulated, we turned our consideration to the application for extension of time to serve the notice of motion.

Application for extension of time

[12] There is no dispute that the notice of motion was served on the respondent's attorneys-at-law outside of the 21-day period mentioned in section 3 of the Order in Council. If service was to be effected on the respondent at the address noted in the motion, such service would also be outside of that period. This prompted the registry to issue a requisition to the applicants to make an application for extension of time to serve the notice of motion, which is the subject under consideration.

[13] Section 3 of the Order in Council has been the subject of judicial interpretation by this court. Brooks JA (as he then was) in **Exclusive Holiday** determined that the 21

days specified to make the application referred only to the filing of the application and did not include the time for service on the other parties. However, he went on to say, the applicant is required to “serve a copy of the notice of motion as soon as possible after filing the original in court” (see para. [17]). In my view, it was contemplated that service would be reasonably prompt or, at any rate, not unreasonably delayed. Subsequently, a practice direction concerning this matter in appeals to Her Majesty in Council as of right, as this is, was issued in 2016 (‘the Practice Direction’). The relevant directions are reproduced below.

“COURT OF APPEAL

PRACTICE DIRECTION NO 1/2016

(Applications for Conditional and Final Leave to Appeal to Her Majesty in Council)

1. Introduction

...

1.3 This Practice Direction takes effect on 10 May 2016.

1.4 This Practice Direction applies to cases where appeals lie as of right from decisions of this court.

...

2. Conditional Leave

2.1 Upon the filing of an application for conditional leave pursuant to section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 the applicant(s) shall serve on the respondent(s) a copy of the said application along with the affidavit and any other documents in support of the application.

2.2 Upon service of the application, affidavit in support and any supporting documents on the respondent(s), the applicant(s) shall file an affidavit of service.

2.3 The respondent(s) to an application for conditional leave to appeal to Her Majesty in Council may within seven days from the date of service of the application file a response to the said application.

...” (Bold as in the original)

It is noted that the Practice Direction stipulates a time that the applicant is to **file** the notice of motion and when the respondent may **file** their response. However, there is no time specified for the **service** of the notice of motion.

[14] The applicants contend that there being no time limit for service of the notice, required by either the Order in Council or the Practice Direction, they are not required to make an application for extension of time.

[15] The respondent submitted that the court did have a discretion whether to grant the application for extension of time. However, it was urged on the court not to favourably exercise its discretion to grant an extension of time as the applicants had not given a “rational and reasonable basis upon which to exercise its discretion”.

[16] The court was not assisted with any authority specifically dealing with an application for extension of time as in these circumstances. Our own research did not yield any results that suggested that the specific application being considered has been the subject of judicial determination by this court. The closest of cases dealt with an application for extension of time in circumstances where it was shown that the filing or service of the relevant document had taken place within the prescribed time. In such cases, no extension of time was deemed necessary. See, for example, **Mark Younis v Alvin Ranglin T/A GG Record** [2020] JMCA App 21 at para. [3], where it was ordered that:

“No extension of time is necessary for the filing of the Notice and Grounds of Appeal. The Notice and Grounds of Appeal filed in the Corporate Area Parish Court (Civil Division) on the 22nd day of March 2019, was properly filed within time and is valid and effectual for commencing the Appeal.”

[17] In **Exclusive Holiday** a preliminary objection was taken to the notice of motion on the basis that it was not served within 21 days of the judgment of the court. Brooks JA, as the single judge who considered the notice of motion, determined, as noted above, that the requirement was as to the time for filing the motion only. This position was arrived at in the absence of an application for an extension of time.

[18] Brooks JA also referenced the judgment of Lewis CJ in **Lesmond v R (No 2)** [1967] 10 WIR 259 and stated that though the late service (oral notice was given after the time for filing had expired and one week before the date of the hearing and written notice was given the day before the hearing) was negatively commented on, it was not treated as fatal to the application. Nor, apparently, was it necessary that an application for extension of time be made.

[19] At para. [30], Brooks JA stated, in conclusion, that the provisions of section 3 of the Order in Council "**may** be satisfied even if the applicant serves notice of the application after the expiry of 21 days" (emphasis mine). That seems to leave open the possibility that there may be circumstances (such as a situation where, on the face of it, the delay was inordinate) where service will be deemed "late" though there is no prescribed time. In those circumstances, an application for an extension of time to serve the notice of motion may be required. Naturally, each case will need to be assessed on its own circumstances to determine if such an application is required or necessary.

[20] In the case at bar, the period of delay of service on the respondent's attorneys-at-law was 19 days. Though there was no explanation proffered, on the face of it, the delay would not be considered inordinate. Accordingly, the absence of an explanation is, in the circumstances, not adverse to the applicants. Further, though mentioned in the respondent's submissions, we received no submissions that service on the respondent's attorneys-at-law was improper.

Conclusion

[21] There being no time prescribed for service of the notice of motion and the delay not being inordinate, I agree with the applicants' submission that the application for extension of time for service of the notice is redundant. Accordingly, I find that it is not obligatory by the Order in Council, the Court of Appeal Rules (CAR), the Practice Direction or any other rule that this application be made.

[22] I would emphasise that notwithstanding that section 3 of the Order in Council does not specify a time limited for service, to promote efficiency and prevent delays, there is a need for parties to serve the notice of motion in a reasonable time so that the other side can respond in time. This is the underpinning of the Practice Direction, of which a reminder was given in paras. [122] – [125] of **Pinnock and Reid v FID**.

[23] It also behoves me to comment on the point made by the respondent that the application for extension of time was served one year after it was filed and that this was an egregious delay. Such a circumstance is only likely to have weighed heavily against the applicants were it considered that this application was necessary.

[24] Therefore, in the premises, I would propose the following orders:

1. The application for an extension of time to serve the notice of motion for conditional leave to appeal to Her Majesty in Council filed on 27 February 2020 is refused on the basis that it was not required or necessary, in the circumstances.
2. The notice of motion for conditional leave to appeal to Her Majesty in Council filed on 31 January 2020 and served on the respondent's attorneys-at-law on the 19 February 2020 was properly served.
3. No order as to costs.

F WILLIAMS JA

ORDER

1. The application for an extension of time to serve the notice of motion for conditional leave to appeal to Her Majesty in Council filed on 27 February 2020 is refused on the basis that it was not required or necessary, in the circumstances.
2. The notice of motion for conditional leave to appeal to Her Majesty in Council filed on 31 January 2020 and served on the respondent's attorneys-at-law on the 19 February 2020 was properly served.
3. No order as to costs.