[2010] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 101/2009

APPLICATION NOS. 69/2010 & 82/2010

BETWEEN	**DOROTHY VENDRYES**	**APPELLANT**
AND	**DR. RICHARD KEANE**	**1ST RESPONDENT**
AND	**KARENE KEANE**	**2ND RESPONDENT**

Mr Andre Earle and Miss Anna Gracie instructed by Rattray, Patterson, Rattray, for the Appellant.

Mr Nigel Jones and Mr Jason Jones, instructed by Nigel Jones & Co. for the 1st and 2nd Respondents

June 8, 18 & July 30, 2010.

IN CHAMBERS

MCINTOSH, J.A. (Ag)

[1] The appellant and the respondents each filed a Notice of Application for Court Orders in this matter. In their application, filed on April 14, 2010, (No.

69/2010), the respondents sought the orders pursuant to rule 2.20(1) of the Court of Appeal Rules (the CAR), namely that:

> "1. The Appellant's Appeal be dismissed for failure to comply with Rules 2.6(1)(c) and 2.7(3)(iii);
>
> 2. Cost of the Application and the Appeal to the Respondents."

[2] They based their application on the following four grounds:

> "a. Skeleton Arguments have been filed by the Appellant as contemplated by the Court of Appeal Rules;
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> b. The Appellant has failed to file a Record as contemplated by the Court of Appeal Rules;
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> c. The Appellant has failed to take any meaningful step and/or any step at all to prosecute the Appeal;
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> d. The respondents are desirous to bring closure to a matter in which there has been a history of failure by the appellant to comply with the Rules of the Supreme Court and Court of Appeal."

[3] On the other hand, the appellant filed her application on May 4, 2010, (No. 82/2010) and the orders she sought were that:-

> "I. The time for filing the Appellant's Skeleton Arguments and Chronology be varied and extended to 3rd May, 2010;
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> II. The time for filing the Record of Appeal be varied and extended to 3rd May, 2010;
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> III. Further, or in the alternative, the Appellant be granted relief from any sanctions imposed

pursuant to her failure to comply with the Court of Appeal Rules;

iv. Costs of this application to be costs in the Appeal;"

[4] She relied on the following six grounds for her application:

> "1. That the failure to comply by the Appellant has not been intentional;
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> 2. The Appellant has a good reason for her failure to comply with the rules;
>
> 3. That the Appellant is in a position to comply with the rules by the date specified herein;
>
> 4. The Respondent will not be unduly prejudiced by the delay;
>
> 5. The Court may utilize this hearing as the Case Management Conference and fix the date for the Appeal;
>
> 6. That the Claimant (sic) will be unduly prejudiced if the order is not varied."

[5] Having determined that the hearing would commence with the application for extension of time (since the principles in both applications and the arguments would be similar and the outcome of this application would determine the fate of the other), the court heard submissions in that regard, on June 8, 2010, reserving its decision to June 18, 2010. Then, on the latter date, the court handed down the decision which is set out below, with a promise, now being fulfilled, to provide written reasons for the orders made:

1. The time for filing the appellant's skeleton arguments, chronology of events and the record of appeal is extended to 3rd May, 2010;

2. The appellant's skeleton arguments and chronology of events filed on the 29th April, 2010 and the record of appeal filed on 3rd May, 2010 be allowed to stand; and

3. Costs of the application to the respondents to be taxed if not agreed.

Then followed case management orders for the conduct of the appeal which was set for hearing in the week commencing on October 25, 2010 and the order refusing the respondents' application to dismiss, with no order as to costs.

[6] The appellant's application was supported by an affidavit from Miss Anna Gracie, sworn to on May 3, 2010, (hereafter "the Gracie affidavit"), in which she advanced an explanation for the delay in filing the outstanding items. She referred to the affidavit of Mr. Jason Jones which was filed on April 14, 2010, in support of the respondents' application to dismiss and stated that it was the receipt of those documents that alerted her to the change in the rules which now provided that where no evidence had been received by the court the appellant could proceed to prepare and file the record of appeal. The appellant has since filed and served the skeleton submissions and the chronology of events and, the record of appeal, though now filed, is yet to be served on the respondents. This, she said, would shortly be done (and indeed it was later said to have been served on May 3, 2010).

[7] Miss Gracie challenged the averment in paragraph 9 of Mr Jones' affidavit which spoke to prejudice being suffered, by the respondents, from the appellant's delay in bringing this matter to a conclusion. On the contrary, Miss Gracie stated, it was the appellant's contention that she had been prejudiced by the respondents' conduct as they had rendered her incapable of keeping her mortgage obligations, resulting in the loss of her home. Everything is now in place, however, for the matter to proceed to a hearing of the appeal.

THE APPLICABLE RULES

[8] The application was made by virtue of the provisions of rule 1.7 of the CAR which deal with the court's general powers of management of its cases, the applicant relying particularly on the power given to the court in rule 1.7(2)(b) to:

> "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

[9] Compliance with the said rules, as amended on August 18, 2006, requires adherence to the following regime, where, as in the instant case, the appeal is from the Supreme Court and no oral evidence was taken (see rule 2.5(4)):

i) Filing and serving of skeleton arguments within 21 days of the filing of the notice of appeal (rule 2.6(1) (c)), together with a written chronology of

events, relevant to the appeal, cross-referenced to the core bundle or record of appeal (rule 2.6(5));

ii) Parties in the matter informing the appellant about the documents they wish to have included in the record or core bundle, said information being supplied within 14 days of the filing of the notice of appeal (rule 2.7(2)(c));

(The framers of our rules may well need to revisit this rule as it is not immediately clear how the parties would know when the 14 days would run without service of the notice of appeal on them.);

iii) Preparing and filing with the registry four sets of the record of appeal, for the use of the court, within 28 days of the filing of the notice of appeal (see rule 2.7(3)(c)); and

iv) Serving forthwith one copy of the record of appeal … on every respondent (rule 2.7(5)).

[10] Rule 2.20 provides sanctions for non-compliance with the rules on the application of a party or on the Registrar's report of the default to the court and rule 2.20(4) provides that "CPR rule 26.8 (relief from sanctions) applies to any application for relief."

[11] Rule 26.8 of the Civil Procedure Rules, 2002 (the CPR) sets out the requirements for such an application. It reads as follows:

"26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to:

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party."

A CHRONOLOGY OF EVENTS RELEVANT TO THE APPLICATION

[12] I turn now to the events which have given rise to the application.

[13] The first date of relevance was **July 17, 2009** when Sykes J, delivered an oral judgment in the matter. That occasioned prompt response from the appellant, who filed notice of appeal on **July 24, 2009**, well within the time allowed by the rules (see rule 1.11). That meant that the appellant had twenty-one days thereafter to file her skeleton arguments accompanied by a written chronology of events, in compliance with rule 2.6(1)(c) and 2.6(5). It can therefore safely be said that to do so on **April 29, 2010**, just over nine (9) months later, was not in compliance with the rules.

[14] The next relevant date was the date of filing of the record of appeal. That should have been within twenty-eight days of July 24, 2009 which, by my calculation, would have been by **August 21, 2009**. However, the record was not filed until **May 3, 2010,** so that the appellant was clearly also in default in this regard and it was not until the respondents filed their application to dismiss the appeal, on **April 14, 2010**, that the appellant sprung into action again, making the application under consideration, on **May 4, 2010.**

[15] To the date of this hearing, the respondents had not complied with the requirements under rule 2.7(2) (c).

SUBMISSIONS

[16] Mr Earle relied on the Gracie affidavit, as providing the explanation for the delayed filing of the appellant's skeleton submissions, chronology of events and the record of appeal. He referred to paragraphs 7 – 9 of the said affidavit in which it was averred that:

i) the appeal was not procedural and this, according to the rules as understood by the appellant's attorneys, meant that they were to await notification from the Registrar that the transcript from the court of trial was available; and

ii) it was not until receipt of the respondents' notice of application for court orders to dismiss the appeal that the amended rule 2.5(4) came to the knowledge of the appellant's attorneys who then appreciated that no notice would be sent out from the registry and that they ought to have proceeded to prepare and file the record of appeal.

[17] Some emphasis was placed on the respondents' failure to comply with rule 2.7(2) (c) and it was submitted that, had the respondent complied with the rule, the appellant would have been in a position to prepare the skeleton arguments.

[18] In Mr Earle's view, the purpose of this requirement is that before the skeleton arguments are filed by the appellant it must be very clear what exactly is before the court when the appeal is to be heard. Furthermore, certain documents had not been served on the appellant in the court below.

[19] He said that the appellant is quite serious about prosecuting the appeal and that, upon appreciating the error in procedure, the appellant prepared her chronology of events and skeleton arguments and filed them on April 29, 2010, serving the documents on the respondents on April 30, 2010. The record of appeal was filed and served on the respondents on May 3, 2010, notwithstanding the non-receipt of the respondents' indications as to their required documents, in accordance with rule 2.7(2)(c).

[20] Mr. Earle referred to the cases of **CVM Television Ltd. v Fabian Tewarie** (SCCA No. 46/2003, (hereafter referred to as **CVM**), a decision of judge of appeal, P. Harrison, as he then was, delivered on May 11, 2005) which dealt with an application for extension of time to file skeleton arguments and **Auburn Court Limited v. The Town and Country Planning Appeal Tribunal & Ors.,** (SCCA No. 70/2004, (hereafter **Auburn Court)**, a judgment of Harris, JA, (Ag), as she then was, delivered on March 28, 2006) which dealt with an application for extension of time to file the record of appeal. These, he said, are cases that were strongly supportive of the appellant's application for extension of time.

[21] He urged the court to consider that the delay was unintentional and not contumelious and that there was no prejudice to the respondents which cannot be compensated in costs. Nor has any irreparable mischief

been done. Further, the grant of an extension would not involve an adjournment of the hearing of the appeal as no date had yet been set.

[22] The application was vigorously opposed by the respondents, Mr Nigel Jones submitting that:

i) the sole reason given for non-compliance was a lack of knowledge of the relevant rules and this was an inadequate explanation;

ii) in circumstances where the appellant has not complied with the relevant rules there is a requirement to file an application for extension of time which ought to be supported by evidence showing not only the reason for the delay but also that there is merit in the appellant's case and he relied on the unreported case of **Peter Haddad v Donald Silvera** (SCCA No. 31/03, Motion 1/07) (hereafter **Haddad**), a decision delivered on July 31, 2007, dismissing an application to discharge the order of a single judge who had refused to grant an extension of time to file the record of appeal and submissions.

[23] He distinguished the cases relied on by the appellant as cases which would have been useful if the issue of merit was not a live one. They were cases in which merit would not have been made out and he had no

knowledge of whether the affidavits in those cases had otherwise satisfied the requirements for the grant of an extension.

[24] Mr Jones conceded that the respondents had not provided the appellant with a list of the documents they required to be included in the record of appeal but, he said, it was clear that this was not put forward by the appellant as the reason for the non-compliance, (notwithstanding Mr. Earle's oral submission). Nowhere in the supporting affidavit was it averred that the respondents' failure to comply accounted for the delay. He said it was important to recognize that there is an obligation on the appellant to file the documents in question, distinct and separate from the respondents' obligation to inform the appellant about the required documents. Whether the respondents were in breach of the rules was immaterial. What the appellant was required to do was to file the record and if the respondents failed to advise her accordingly, all it meant was that the respondents could not thereafter complain that they had no input in the composition of the record.

[25] He further submitted that this was not an appropriate case for relief from sanctions, as the applicant was unable to satisfy the requirements outlined in rule 26.8 of the CPR. Most importantly, he submitted, the rules require that the application be made promptly and, in the instant case, there was no indication that it was so made. In **Haddad** the period

involved was eight months and the application was refused. In this case the period was ten months. If the application was not made promptly and was not supported by affidavit, there would be no need to go further as that was the first requirement before advancing to the other considerations. In this case there has been no attempt to show that the application was made promptly.

THE AUTHORITIES

[26] Since the inception of the new regime in the civil arena occasioned by the CPR and the CAR, several applications for extension of time within which to comply with steps required to be taken in the civil litigation process have come up for consideration in the courts and a body of local authorities is steadily developing in this area. Some of these authorities were referred to by the attorneys-at-law in this matter and they require careful scrutiny to see what principles may be distilled from them as to how the court may be guided in the exercise of its discretion when dealing with these applications.

[27] In **CVM**, the court had before it an application by the respondent to extend time to file skeleton arguments. The appellant filed a notice of preliminary objection submitting that the court ought not to hear the application as the respondent was in breach of rule 2.6(2) of the CAR by not filing its skeleton arguments for one year and two months outside of

the prescribed time. Along similar lines as the respondent's submissions in the instant case, the appellant in **CVM** argued that the delay was extreme and portrayed a defiant disregard for the rules. Further, the reasons advanced (due to an oversight by the respondent's attorneys-at-law and a heavy work schedule), were insufficient and the course of conduct was prejudicial.

[28] P. Harrison, JA, as he then was, reasoned that although the explanation given for the delay was good but not altogether adequate, it was not entirely nugatory. Further, his Lordship pointed out that the delay was not that of the respondent (as in the instant case) and "the interest of the respondent not to be excluded from the appeal process due to the fault of counsel, is an aspect of doing justice between the parties".

[29] His Lordship went on to say that the delay being significant may have created some prejudice to the appellant. However, an expedited date of hearing of the appeal would be a helpful cure. In all the circumstances, a two (2) day extension was granted to the respondent.

[30] In **Auburn Court** two applications were considered by the court namely, (i) an application by the respondents to strike out the appeal and (ii) an application by the appellant to enlarge the time to file the record of appeal. Harris, JA (Ag), as she then was, stated (at page 5 of her

judgment) that it was incumbent on the court after examining all the circumstances of a case to determine how best to deal with it justly.

[31] It was argued by the respondents in **Auburn Court** that the delay in filing the record was protracted and that there was a failure to file even after two (2) reminders issued to the appellant's attorneys-at-law by the registry to do so. It was submitted that the appellant was only goaded into action subsequent to the respondents' application to strike and further submitted that the reasons advanced (the transcript received by the appellant was in disarray with several missing pages; heavy work schedule and court appearances, failure of the respondents to comply with the requirement of rule 2.7(2) and personal difficulties requiring counsel to leave the jurisdiction on occasions) were inadequate.

[32] Reference was made by the respondents in that case to **City Printery Ltd. v Gleaner Co. Ltd.** (1968) 10 JLR 506 where the application for extension of time to file the record of appeal came after a two (2) year delay . The reason given was clerical changes in the attorney's staff and relocation of his office. This application was refused as the court held that no satisfactory account had been given for what the court held to have been an inordinate delay

[33] The learned judge of appeal carefully assessed the explanation advanced for the delay in **Auburn Court** and concluded that although it

was reasonable, it was somewhat deficient but such explanation could not be ignored. The non-compliance was not intentional and the delay (from August 9, 2005 to February 26, 2006 when the application for extension of time was filed) was not excessive. Harris, JA said the just disposal of the case and the interest of the appellant are of manifest importance. The appellant should not be made to suffer by reason of his attorney's dereliction of duty. (This point was also made in **CVM** which was also referred to by the court).

[34] Further, the learned judge said, it had not been suggested by the respondents that they had suffered any irreparable mischief consequent upon the delay. Any difficulty or disadvantage which they might have suffered as a result of an order enlarging time could be remedied by imposition of costs. "Justice", she said, "though impeded by the delay will not be defeated as the appellant's failure to comply with the rules can be remedied within a short time."

[35] The respondents had failed to comply with rule 2.7(2) (c) (as did the respondents in the instant case) and, in her reasoning, Harris JA made it clear that the onus rested on the appellant's attorneys-at-law and not the respondents to file the record (a point made by Mr. Jones in his submissions) and that the appellant could have sought the information

from the respondent if it was not forthcoming. However, her Ladyship said that it could not be argued that the respondents were without blame.

[36] In the final analysis Harris JA held that to grant an extension of time to the appellant would not require an adjournment of the hearing since a hearing date had not yet been fixed (as in the instant case) and that any future hearing date set could easily be met. Accordingly, the learned judge granted a fourteen day extension of time to the appellant for the filing of the record.

[37 The application in **Haddad** was for a discharge of the order of the single judge who had refused the appellant's application to extend time to file the record of appeal and submissions. The Registrar's notice to the parties, pursuant to rule 2.5(1) (b) (iii) of the CAR was sent out on March 30, 2005 and the filing of the record of appeal should therefore have followed twenty-eight (28) days later but this was not done until December 5, 2005. Then, on March 26, 2006, almost one year after the Registrar's notice, the appellant filed the application seeking an extension of time.

[38] The affidavit which accompanied the application before the single judge contained an explanation that the attorney who had conduct of the matter was no longer with the firm and the matter had only been discovered on an examination of his files. It was averred that failure to file

submissions was due to an oversight – that it took some time to deal with the attorney's files and by the time this particular file was reached, the time for filing had expired. The affiant said that the appellant was still serious about pursuing the appeal.

[39] In the exercise of his discretion, the single judge held as follows:

> "(1) The applicant has for approximately eight (8) months neglected to have regard for the imperative direction of Rule 2.7(3)
>
> (2) The reason given:
>
> (i) Settlement discussions
>
> (ii) That the attorney-at-law (sic) who had conduct of the case having left the firm are not such to persuade me to grant this application. In holding this view, I am cognizant of the overriding objections (sic) underpinning the Civil Procedure Rules in particular the expeditious and fair criterion.
>
> (3) The application is refused."

[40] By way of an amended notice of application for court orders dated January 5, 2007 and filed January 24, 2007, the appellant sought (i) the discharge or variation of the single judge's order which was dated April 26, 2006; (ii) an extension of twenty-eight (28) days to file written

submissions and list of authorities and (iii) an extension to December 5, 2005 (the date when the record was handed in at the registry), to file the record of appeal. The affidavit which supported the application was in similar terms to that which was before the single judge save for the addition of the single judge's order.

[41] Miss Hilary Phillips, learned Queen's Counsel for the appellant, as she then was, submitted that the single judge in the exercise of his discretion failed to take into consideration the merits of the appellant's appeal and any question of prejudice to the respondent. She relied on the cases of **Leymon Strachan v The Gleaner Co** SCCA Motion No. 12/99, delivered December 6, 1999 and **Finnegan v Parkside Health Authority** [1998] 1 All ER 595 and submitted that the absence of a good reason for delay was not in itself sufficient to justify the court refusing to exercise its discretion to grant an extension. She submitted that the court was required to consider all the circumstances of the case in the context of the overriding objective.

[42] Learned Queen's Counsel referred to an affidavit which was included in what the court termed "the irregularly filed record of appeal". Its contents, she submitted, showed that there was a realistic prospect of the appeal succeeding but the court held that the affidavit being contained in the irregular record was not before it for its consideration.

[43] The respondent's attorney submitted that the appellant ought to provide some satisfactory explanation for the delay upon which the court can exercise its discretion. Counsel said that a number of decisions of the Court of Appeal underscored the principle that there must be adequate explanation for the delay and in **Haddad** there had been no satisfactory explanation for the delay in filing the record of appeal or in applying to the court to discharge the order of the single judge. She relied on **Benjamin Patrick v Frederika Walker** (1969) 11 JLR 303; **Central Soya of Jamaica Ltd. v Junior Freeman** (1985) 22 JLR 152 and **City Printery v the Gleaner Co. Ltd** (supra). However, learned Queen's Counsel submitted that these cases pre-dated the current rules and were no longer good law.

[44] In highlighting the undisputed facts, Smith JA, as he then was, in delivering the judgment of the court, said that the application before the court was made eight (8) months after the single judge's order and that no reason was given for that delay. His Lordship referred to the complaint of learned Queen's Counsel that the single judge did not take into account the merits of the appeal and the question of prejudice to the respondent and said that in refusing to grant the extension the single judge had stated that he was "cognizant of the overriding objectives underpinning the CPR, in particular the expeditious and fair criterion". His

Lordship went on to point out, however, that only the affidavit of the attorney who was reviewing the files was before the single judge to support the application (nothing from the attorney who had had conduct of the matter, whose input may well have been helpful) and "There was not one scintilla of evidence in respect of the merits of the applicant's appeal or of any likely prejudice to the respondent". What the court was clearly saying here was that the complaint was without foundation as no material had been placed before the single judge, in respect of these matters, for his consideration. Ultimately, the court held that the applicant had not shown that in refusing the extension the single judge had wrongly exercised his discretion.

[45] In dealing with the delayed application before the court, Smith JA had this to say:

> "The Court of Appeal Rules do not state any time period within which an application to discharge or vary the single judge's order shall be made. In such a case the application to discharge or vary should be made within a reasonable time. The question as to what constitutes a reasonable time must be determined by reference to the overriding objectives of the rules. However, in my judgment, unless there are exceptional circumstances, an application to discharge the order of the single judge refusing to extend time should be made promptly. If not made promptly the applicant must give reasons for not acting promptly.
>
> Failure to give reason for the undue delay is, in my view fatal. ...It is not possible to deal with an

> application for extension of time, or I may add, an application to discharge an order refusing to extend time justly without knowing why the claimant had failed to comply with the rule or to act promptly."

[46] The court was in no doubt that the applicant in **Haddad** had failed to act promptly and "the absence of any explanation for this failure, on the facts of this case, was decisive" with the result that the application for orders to vary the single judge's order and to extend time was dismissed.

ANALYSIS AND CONCLUSION

[47] The principles to be distilled from the authorities concerning the factors to be taken into account in the exercise of the court's discretion to grant or refuse an application to extend time where there has been a failure to comply with its rules, are clear and consistently applied by our courts. In **Haddad** the court referred to the "pre 2002 CPR era" and the factors which were then established as factors to be considered. These include the length of the delay, the reasons for the delay, whether there was an arguable case for an appeal and the degree of prejudice to the other parties if time is extended. The court went further to say that in interpreting the CPR, a number of cases held to the view that although the pre CPR principles are not binding, they remain relevant, not as rules but as matters which must be considered in an exercise of the court's discretion.

[48] The cases also establish that notwithstanding the absence of a good reason for the delay the court was not bound to reject an application for extension, as the overriding principle was that justice had to be done (see **Leymon Strachan v the Gleaner Co.** referred to above). However some reason must be proffered.

[49] In **Hashtroodi v Hancock** [2004] 3 All ER (D) 530 (cited in **Haddad**) the court did not think it prudent to produce a checklist of relevant factors in relation to applications for extension of time. The guiding principle to be distilled from that case, said Smith JA in **Haddad**, is that a court should exercise its discretion in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor. Although **Hashtroodi** concerned an application in the trial court, his Lordship expressed the view that the principles enunciated in that case were equally applicable to the rules of the Court of Appeal "save that the approach of this court is different". In the view of the learned judge of appeal, as he then was, the aggrieved party must act promptly as the successful party is entitled to the fruits of his judgment and so the court should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application. His Lordship referred to the case of **United Arab Emirates v Abdelghafar** (1995) 1 C.R. 65 where Mummery J said, "The interest of the parties and the public in certainty

and finality of legal proceedings make the court more strict about time limits on appeals."

[50] Based on the above review, this court arrived at the following conclusions:

a. Each case must be decided on its own particular facts. There are no hard and fast theoretical circumstances which will trigger the court's discretion to grant or refuse an application.

b. The sufficiency of the reason/explanation proffered is entirely for the determination of the court having regard to all the surrounding circumstances - ("It is incumbent on the court, after examining all the circumstances of a case to determine how best to deal with it justly", per Harris JA (Ag) in **Auburn Court**).

c. Although the length of the delay is a factor to be considered there is no principle to be extracted from the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay is but one factor to be considered by the court in its aim of dealing fairly with the parties, avoiding prejudice, saving expenses and ensuring that the cases are dealt with expeditiously. (see

for example **Finnegan v Parkside Health Authority** referred to above).

d. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties (see **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934 at page 939 – a quotation by Harris JA taken from Lord Woolf's judgment in **Haddad**).

e. While the likelihood of the success of the appeal is a factor for the court's consideration, there is no requirement for an applicant to file an affidavit of merit. There is no principle enunciated in any of the authorities reviewed which required such an affidavit.

f. **Haddad** was not an authority for the proposition, advanced by counsel for the respondents, that the applicant for extension of time must file an affidavit not only explaining the delay but also showing the merits of the appeal. In dealing with the issue of merit, (which was raised in that case by the applicant's counsel, who had complained that it was a factor which was not considered by the single judge), all that the court was saying was that there was no evidence in that regard before the single judge for his consideration, not that

this was a deficiency in the application. The emphasis of the court was on the inadequacy of the explanation, as assessed by the single judge. (And, it is at least noteworthy that neither **CVM** nor **Auburn Court,** two decisions of this court, appear to have been cited before the single judge).

[51] In the final analysis, this court found the cases of **CVM** and **Auburn Court** to be of great assistance in arriving at a determination in this matter as the circumstances in those cases were easily identifiable with those in the instant case (unlike those in **Haddad**). This was not a case in which it could be said that no explanation was proffered; and it was one which clearly showed that the appellant was not at fault. She has remained as interested as ever to pursue her appeal and this court shared the view expressed in **CVM** and **Auburn Court** that the default of her attorneys should not be visited upon her. Ignorance of the law, it has oft been said, is no excuse and that must particularly be so in the case of an attorney-at-law but the explanation advanced still warrants some consideration. When a certain procedure has been followed over time it becomes routine and in this case the old procedure was being followed until the new procedure became known at which point the appellant's attorney acted within a reasonable time, filing the outstanding documents some fifteen or so days after receiving the respondents' notice of application.

[52] It seemed to this court that the explanation was genuine and it was accepted that the delay was unintentional and not contumelious. Further, unlike the applicant in **Auburn Court,** who, even after two reminders of its default had still not filed the outstanding record up to the date of the hearing of the application to extend time, this appellant has already filed the outstanding documents. No date had yet been fixed for the hearing of the appeal so no adjournment was involved and the matter stands ready to proceed whenever the date is fixed.

[53] **Haddad** was clearly decided on its own particular facts. It is the view of this court that there was reason enough for the single judge's approach to the application before him. The attitude of the applicant in further delaying the filing of skeleton arguments and list of authorities even after discovering the default and after filing the record, then seeking a further twenty-eight days to do so, could not have found favour with the single judge. Further, the supporting affidavit had disclosed that the Registrar's notice of the availability of the transcript had been received from March 2005 but it was not disclosed when the attorney who had conduct of the matter left the firm and what was the "sometime it took to assess" all his files. And there was no affidavit from the defaulting party himself. From all appearances it would seem that the single judge did not have material before him which was capable of persuading him to grant the application and the court found no basis for disturbing his decision.

[54] In the instant case, there was the added factor of the default of the respondents which, as stated by Harris, JA, in **Auburn Court,** ought not to be ignored. After considering all the circumstances and after applying the principles distilled from the authorities, the court was firmly of the view that this was a proper case for the exercise of its discretion in favour of the appellant. Further, in agreement with the approach taken by Harris, JA, this court concluded that the imposition of costs would be a remedy for any difficulty or disadvantage which the respondents might suffer as a result of the order for enlargement of time.

[55] There is one matter remaining to be addressed before bringing this analysis to a conclusion. As the court was about to deliver its decision, counsel for the respondents sought to introduce the case of **Arawak Woodworking Establishment Ltd. v Jamaica Development Bank Ltd** [2010] JMCA App 6, a decision of this court, delivered on May 14, 2010 which he regarded as supportive of the respondents' case that the applicant for an extension of time to comply with the rules must file an affidavit speaking to the merits of the appeal. This latter authority was not provided to the court and, importantly, it was not said to have introduced any new principle but was stated to be a case in which the Court of Appeal accepted that merit was an important feature of applications for extension of time, a submission which had already been advanced on behalf of the respondents and duly considered in the determination of this

matter. Further, Miss Gracie, who appeared with Mr Earle for the appellant, indicated her involvement with the matter in the court below and expressed the view that the case did not offer the assistance contended for by the respondents. It had been the appellant's contention that there was no principle to be extracted from any of the authorities relied on that an applicant for an extension of time need establish that there is merit in the appeal and this has already been addressed.

[56] It was on the basis of all of the above that the decision, set out at paragraph [5] herein, was reached.