

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 43/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

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| BETWEEN | DAVID WONG KEN | APPLICANT |
| AND | NATIONAL INVESTMENT BANK OF JAMAICA LIMITED | 1 ST RESPONDENT |
| AND | CLARENDON LIME COMPANY LTD | 2 ND RESPONDENT |
| AND | LIMESTONE CORPORATION OF JAMAICA LTD | 3 RD RESPONDENT |
| AND | DR VINCENT LAWRENCE | 4 TH RESPONDENT |
| AND | HORACE CLARKE | 5 TH RESPONDENT |

Lord Anthony Gifford QC and Miguel Willams instructed by Livingston Alexander and Levy for the applicant

Charles Piper and Miss Marsha Locke instructed by Charles E Piper and Associates for the 1st respondent

Garth McBean and Miss Teri-Ann Lawson instructed by DunnCox for the 2nd, 3rd and 5th respondents

Michael Hylton QC and Miss Melissa McLeod instructed by Michael Hylton and Associates for the 4th respondent

3 and 21 June 2013

BROOKS JA

[1] In his application filed on 24 April 2013, the applicant Mr David Wong Ken sought an extension of time in which to file notice and grounds of appeal against a judgment that Sykes J handed down on 16 March 2012. We heard the application on 3 June 2013 and, at that time, made the following orders:

- a. Application for extension of time to file appeal refused;
- b. Costs to the respondents to be taxed if not agreed.

At that time, we promised to put our reasons in writing. We now fulfil that promise.

[2] Before the learned judge were four claimants in the claim instituted against the five respondents. Of the four claimants, three were directors of Western Cement Company Limited (the company): Mr Wong Ken and two other individuals. The company was the fourth. During the trial, Mr Wong Ken had, along with the other individual claimants, decided not to pursue the claim, but to allow the company to be the sole pursuer.

[3] There was also a counter-claim that arose from a loan that the 1st respondent National Investment Bank of Jamaica (NIBJ), had made to the company. That loan was guaranteed by the applicant's directors, including Mr Wong Ken.

[4] In his decision, Sykes J gave judgment for the respondents herein on the claim, and judgment to NIBJ on the counter-claim. The formal order of Sykes J's judgment states:

- "1. Judgment for the First, Second, Third, Fourth and Fifth Defendants on the claim;
2. Judgment for the First Defendant against the Claimants in the sums of US\$7,918,489.12 and J\$9,533,955.14 on the counterclaim with interest on the sum of US\$582,398.69 at the rate of 13% per annum on the sum of US\$3,258,722.37 at the rate of 14% per annum and on the sum of US\$4,077,368.06 at the rate of 12% per annum from June 1, 2010 to the date of Judgment;
3. Stay of execution granted for six (6) weeks."

Lord Gifford QC, who appeared for Mr Wong Ken, stated that the appeal, if Mr Wong Ken's application were to succeed, would be limited to the counter-claim.

[5] Learned counsel submitted that the justice of the case required that the application should be granted. The main thrust of his submissions may be summarised as follows:

- (a) the company's appeal against the claim, has a good prospect of success;
- (b) if the company's appeal succeeds, not only will its claim succeed but the counter-claim will be extinguished;

- (c) if the judgment against the company on the counter-claim is overturned then there would be no basis for the judgment on the counter-claim against him, to stand; and
- (d) in order to protect his position, therefore, Mr Wong Ken ought to be an appellant himself.

[6] Lord Gifford acknowledged that the application was, in fact, very late. He pointed to the reason given by Mr Wong Ken, in his affidavit in support of the application. In that affidavit, Mr Wong Ken stated that the failure to file a notice of appeal and the delay in making this application was due to the fact that he was concentrating on having the company file and pursue its appeal against Sykes J's judgment. It was that focus, he said, that caused him to lose sight of the fact that he should also have appealed. Lord Gifford expressed confidence in the merits of the appeal and submitted that, taking into account all the circumstances, including the fact that there was no prejudice to the NIBJ pending the hearing of the appeal, the application should be granted.

[7] Mr Piper, on behalf of NIBJ, stoutly resisted the application. He argued that:

- (a) the delay in making the application was inordinate and inexcusable;
- (b) Mr Wong Ken's explanation for the delay, was untenable as Mr Wong Ken, as an attorney at law,

could not claim ignorance of the requirement and was not seeking to blame his legal representatives for the breach of the rules;

- (c) not only did Mr Wong Ken and the other directors abandon the claim, but neither they nor the company sought to resist the counter-claim;
- (d) Mr Wong Ken had produced no argument to show that the loan was disputed or that the counter-claim should not stand, and there was nothing to support a set-off by any judgment on a successful claim, against the judgment on the counter-claim; and
- (e) in the circumstances there was no likelihood of success in an appeal against the counter-claim, either by the company or by Mr Wong Ken.

[8] Learned counsel relied on the cases of **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6 and **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23, in support of his submissions. In those cases, this court provided clear guidance on the method of assessing applications for extension of time to file a notice of appeal.

[9] In the latter case, Morrison JA adopted the legal position on such applications, as stated by Panton JA (as he then was), in the case of **Leymon Strachan v Gleaner**

Company Ltd and Dudley Stokes (Motion No 12/1999 – judgment delivered 6 December 1999). It is as follows:

“The legal position may therefore be summarised thus:

- (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
- (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
- (3) In exercising its discretion, the Court will consider-
 - (i) the length of the delay;
 - (ii) the reasons for the delay;
 - (iii) whether there is an arguable case for an appeal and;
 - (iv) the degree of prejudice to the other parties if time is extended.
- (4) **Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.”** (Emphasis supplied)

[10] In his reply to Mr Piper’s submissions, Lord Gifford especially adopted the portion of the extract that has been emphasised above. It is along the lines of that guidance that the present application will be assessed.

a. The length of the delay

[11] Although Sykes J's decision was handed down on 16 March 2012, and the company's notice of appeal was filed in April 2012, the formal order of the judgment was not served on Mr Wong Ken's attorneys-at-law until 12 September 2012. His application was filed over 7 months later, on 24 April 2013. There is no doubt, therefore, that the delay was indeed, lengthy. The rules stipulate that a notice of appeal must be filed within 42 days of the service of the formal order of the judgment. The delay, by itself, will not, however, be determinative of the application.

b. The reasons for the delay

[12] It is difficult to accept Mr Wong Ken's explanation for his delay in deciding to appeal against the judgment. It is far more plausible that, having withdrawn from the claim, and the company not having, as Sykes J said at paragraph 216 of his judgment, mounted any challenge to the fact that the loans had been made and the amounts outstanding thereon proved by NIBJ, that the stress was on the challenge to the judgment on the claim. Mr Wong Ken's reason is not a good reason, but, again, this alone will not result in his application being refused.

c. whether there is an arguable case for an appeal.

[13] In considering the reason given for rejecting Mr Wong Ken's explanation for the delay in filing his application, it seems that Mr Piper is correct in his submission that there is no basis for challenging the counter-claim and therefore no likelihood of success in such a challenge. The company has hung its star on succeeding on its

appeal against the claim. It hopes that the damages that it will secure will far outstrip the amount of the debt resulting from the loan. No real challenge has been made to the counter-claim in this appeal. It cannot be said that there is an arguable appeal.

d. the degree of prejudice to the other parties

[14] Lord Gifford has submitted that NIBJ will suffer no real prejudice. There has not been any real challenge to this assertion. This factor is in Mr Wong Ken's favour but is not determinative of the application.

e. what decision does justice require?

[15] Lord Gifford argued that justice in this case required the observation that while the NIBJ would suffer no loss by the granting of the application, Mr Wong Ken would be most seriously affected by a refusal. If, however, as has been accepted above, there is no real prospect of success in overturning the judgment on the counter-claim, then the justice of the case requires that the application should be refused.

[16] It is for the reasons set out above that we ordered that the application for extension of time in which to file a notice of appeal be refused.