IN THE COURT OF APPEAL OF BELIZE AD 2022

CIVIL APPEAL NO 5 OF 2021

THE ATTORNEY GENERAL OF BELIZE Appellants
MINISTER OF NATURAL RESOURCES

v

OLIVIA SYLVIA VILLANUEVA Respondent

Before:

The Hon Madam Justice Woodstock Riley	Justice of Appeal
The Hon Madam Justice Minott-Phillips	Justice of Appeal
The Hon Mr. Justice Foster	Justice of Appeal

A Marshalleck SC along with I Swift for the appellants.
D Bradley along with D Arzu-Torres for the respondent.

17 March 2022 and 22 June 2022

JUDGMENT

WOODSTOCK RILEY, JA

Introduction

[1] In this matter, the Appellants by Amended Notice of Motion dated 9th July 2021 sought an order for the extension of time to serve and/or re-file the Notice of Appeal and leave to serve the Notice by way of advertisement. It is not in dispute that the Notice of Appeal has been filed; the dispute lies in the service of the relevant Notice on the Respondent within the requisite timeframe pursuant to **Order II Rule 4(2) of the Court of Appeal Rules**.

[2] Since filing the Amended Motion, the Appellants served the Notice of Appeal on the Respondent's legal representatives on 19th August, 2021. The Appellants indicate they therefore now only seek an extension of time to serve its Notice of Appeal to 19th August, 2021.

[3] The Appellants are of the opinion there was an agreement for service on the Respondent's attorneys and/or service properly effected on the 19th August, 2021. The Respondent in her Submissions takes the position that service has still not been effected. However, the Third Affidavit of Carlton Spencer exhibits correspondence from the Respondent's counsel dated 16th August, 2021 confirming awareness of efforts to serve Mrs. Villanueva and instructions were given "*for the delivery of any documents in respect of Mrs. Villanueva*" to their offices. Mr Spencer's Affidavit confirms he accordingly delivered the Notice of Appeal and other relevant documents to the Respondent counsel's office on the 19th August 2021.

Background

[4] The Claim in the Court below ***Claim No. 124 of 2019 Olivia Villanueva v Attorney General, Ministry of Natural Resources*** related to compensation to the Respondent for two separate parcels of land. During the course of those proceedings the Appellants and the Respondent entered into a Consent Order, on the 11th June, 2019 and perfected on 17th June, 2019. The terms of the Consent Order were:

1. *The Defendants are to transfer and issue title to property situate at Hicks Caye and comprising of 105.00 acres of land, as shown on Survey Plan 2242, situate along the Northern Seacoast near the center of Hicks Cay, approximately 13.5 miles Northeast of Belize City, Hicks Cay, Belize District (Plan No. 2242, File No. NES-101600157) to Olivia Villanueva on or before the 25th June 2019.*

2. *The Defendants are to locate alternate property for issuance to the Claimant in respect of property situate at Turneffe Caye comprising of 102.53 acres of land, situate along the East Coast of the Turneffe Islands, approximately 29.9 miles southeast Belize City, Turneffe Atoll, Belize District on or before the 25th June 2019.*

Failing a satisfactory settlement of the matter, the Claimant shall file an application for assessment of damages on or before June 28th, 2019. The application shall be heard by way of Affidavit evidence.

3. *The Claimant shall file and serve written submissions on or before 29th July 2019.*

4. *The Defendants are at liberty to respond on or before August 26th, 2019.*

5. *Costs are reserved."*

[5] The Appellants transferred title to the Hicks Caye property to the Respondent as provided in paragraph 1 of the said Consent Order.

[6] With regard to paragraph 2 of the said Order the Respondent on 4th July, 2019 filed an "Application for Assessment of Damages".

1. *"Damages for the unlawful acquisition of property comprising 102.53 acres situate at Turneffe Island Range, Belize District subject of Minister's Fiat Grant No. 312 of 2003 dated February 5th, 2008 and the cancellation of its title.*
2. *Damages for loss of use and/or opportunity against the Defendants.*
3. *Interest at such rate and for such period as this Honourable Court deems just.*
4. *Costs and Attorney's Costs.*
5. *Such further and/or other relief as this Honourable Court deems just."*

[7] The grounds of the Application indicated that "*the parties have failed to agree on an alternate property and request that damages be assessed for the unlawful acquisition of its property and loss of use, and that one Talbert Brackett, licensed valuer has undertaken a valuation of the property*".

The Respondent filed an Affidavit of Talbert Brackett on the issue of value. There was no reply affidavit or evidence filed by the Appellants.

[8] At the conclusion of the hearing for the assessment of damages, and by written decision The Honourable Chief Justice (Ag) Michelle Arana ordered the Appellants to pay $5,639,000 noting, *"using the Direct Comparison Approach, Mr Brackett has valued this 102.53 acres of property (at) $BZD 5,639,000. The Court therefore accepts this valuation as an accurate estimate of the value of this property and awards the sum of $BZD 5,639,000 to be paid to the Claimant by the Defendants. Costs awarded to the Claimant to be paid by the Defendants to be agreed or assessed.*"

[9] The Honourable Chief Justice (Ag.) delivered her judgment in favour of the Respondent on the 12th day of March, 2021 which was perfected on the 12th day April 2021. The said perfected order in addition to the award of $5,639,000 in damages to the Respondent, noted "*interest is payable on the above mentioned sums at the rate of 6% from the date of the claim until payment in full*".

[10] The Appellants filed a Notice of Appeal on the 28th day of April 2021 challenging the entire decision of the learned trial Judge but did not serve said Notice within the seven (7) days stipulated by **Order II Rule 4(2) of the Court of Appeal Rules**.

[11] On the 14th day of May, 2021, the Appellants filed a Notice of Motion "*pursuant to Section 12 of the Court of Appeal Act and Order 11 Rule 3 of the Court of Appeal Rules and/or the inherent jurisdiction of the Court seeking an extension of time to file the Notice of Appeal and for substituted service by way of Advertisement*". Affidavits of Kimberley Wallace, Crown, and Kenrick Staine, process server, were also filed indicating the efforts made to serve within the stipulated time and at the addresses given in the Claim and provided by persons at that address.

[12] On the 9th July, 2021, the Appellants filed an Amended Notice of Motion for an Order *"pursuant to Sections 12 and 13 of the Court of Appeal Act and Order 11 Rule 3 of the Court of Appeal Rules and/or the inherent jurisdiction of the Court"* that time be extended "*to serve and/or re-file*" the Notice of Appeal and substituted service by way of Advertisement.

Issues

[13] The issues for determination are as follows:

i. Does the Court of Appeal have the jurisdiction to make an order for an extension of time for service of the Notice of Appeal? If not can and/or should an order to re-file be made.

ii. If the Court of Appeal is seized of such jurisdiction, have the Appellants satisfied the court that it should exercise its discretion in this matter?

The submissions of the Appellants

[14] The Appellants assert in supporting evidence that this failure to serve within the requisite time is borne by the Respondent whom they have reason to believe evaded service. They further state that service was eventually effected on the Respondent's legal representative upon the directions of the Respondent's husband.

[15] In their initial submissions on the 30th August, 2021, the Appellants submit that this Court is empowered to grant such relief pursuant to sections 12 and 13 of the Court of Appeal Act. Section 13 confers jurisdiction on the Court to deal with the time for service of the notice as a matter necessary for the hearing of the appeal which was in fact commenced on the filing of the notice and which remains pending before the Court and section 12 which incorporates by reference the rules of the Court of Appeal of England to govern the procedure for the required application by virtue of the absence of any relevant provisions in the existing rules.

[16] Alternatively, that this Court is obligated to interpret section 16 and Rule 4 Order II in a manner that upholds the Appellants' rights to access to Court. The inflexible deadline of 7 days to serve the Notice would be disproportionate amounting to an infringement of that right. Therefore, this court may properly choose to read into section 16 and Rule 4 order II a power to extend the time for service.

[17] **Section 13 of the Court of Appeal Act** provides:

> 13 - *(1) Subject to this Part and to rules of court, the Court shall have jurisdiction to hear and determine appeals from judgments and orders of the Supreme Court given or made in civil proceedings and for all purposes of and incidental to the hearing and determination of any such appeal.*

[18] The Appellant relied on **Rule 3(2) Order11 of the Court of Appeal Act** that an appeal is '*deemed to have been brought when the notice of appeal has been filed with the Registrar'.* An Appeal thus existing, they averred that an order for extension of time and substituted service is incidental to the hearing of the Appeal therefore the provision presupposes that such an order could be made.

[19] It was also submitted on their behalf that **section 12 of the Court of Appeal Act** imports the means by which such jurisdiction is invoked, not by conferring any jurisdiction but by governing the procedure for the application, which is that the laws of England which provide for an extension of time may be imported. This section states that:

> 12 - *Where in any case no special provision is contained in this or any other Act, or in rules of court, with reference to any jurisdiction of the court in relation to appeals in criminal and civil matters such jurisdiction shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being in force in England in the Court of Appeal.*

Amendment

[20] On 15th September 2021, **section 16(3) of the Court of Appeal Act** was amended by **Act No. 16 of 2021.** It is relevant to set out section 16 in its entirety:

> "*16 (1) Where a person desires to appeal under this Part to the Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within twenty-one days*

from the date on which the order of the Supreme Court or judge thereof was signed, entered or otherwise perfected.

(2) *The appellant shall file notice of his grounds of appeal within twenty-one days after he has been notified by the Registrar that the record is ready for his use.*

(3) ***The Court may, subject to such terms and conditions as it thinks fit, enlarge the time limits mentioned in sub-sections (1) and (2) or any provision that imposes a time limit herein, upon such terms as the justice of the case may require, and any such enlargement may be ordered although the application for the enlargement of time is not made until after the expiration of the time appointed or allowed under sub-sections (1) or (2), or the Court may direct a departure from this in any other way where this is required in the interests of justice."*** (my emphasis)

The submissions of the Respondent

[21] The Respondent in her submissions of 15th November, 2021 submits that there is no jurisdiction for this court, "*vested in this Honourable Court at the time the Notice of Appeal was lodged and was to be served, that permits this Honourable Court to extend the time for service beyond the seven (7) days provided".*

[22] She further avers that even if the court finds it has jurisdiction, the Appellants have not satisfied the court so as to warrant it exercising its discretion in the Appellants' favour. Her basis for saying so is that the appeal is devoid of merit, in support of which contention were comprehensive submissions on the relevant grounds of appeal set out. In particular, the Respondent maintains that the length of, and reason for, the delay as well as the prejudice to her weighs against the Appellants' application.

[23] Neither submissions addressed the issue of the re-filing' the Notice of Appeal.

LAW AND ANALYSIS

I. Does the Court of Appeal have the jurisdiction to make an order extending the time for service of the Notice of Appeal

[24] **Order II section 3 of the Court of Appeal Act** contains specific provisions for extending the time in which an appeal can be filed. Yet neither the Court of Appeal Act nor the Rules contained specific provision for extending the time within which a notice of appeal can be served. In ***Derek Aikman v The Belize Bank Ltd***[1] para 5 the Court noted:

> *The first question which we had to decide was whether there was power to extend the time for serving the notice of appeal, since neither the Court of Appeal Act nor the Court of Appeal Rules, 1967 contains specific provisions for extending the time within which a notice of appeal is required to be served. There is much to be said for the approach that the significant act is the filing of a valid appeal, that service of the notice of appeal on the respondent named in that appeal is merely a procedural step towards the hearing of the appeal, and that the time prescribed for taking that step is part of the time-table for the conduct of the litigation. On this approach the power conferred by Order II rule 3 of the Court of Appeal Rules to extend the time for performing the significant act of filing the appeal must necessarily include a concomitant power to extend the time for taking the merely procedural step of serving the notice of appeal… ."*

[25] The more recent Court of Appeal decisions from Belize must be noted, ***Sharryn Dawson v Central Bank of Belize*** Civil Appeal No. 18 of 2015 in which the majority was harshly critical of **Aikman** and also in ***King's Company Limited v Development Ltd*** Appeal No. 37 of 1028, concluding that that there is no jurisdiction vested in the Court of Appeal to extend time for service of a Notice of Appeal.

[1] Civil Appeal No 12 of 1992

[26] The parties debated the merits of these decisions however, both counsel recognised that **section 16(3) of the Court of Appeal Act**, as amended on 15th September, 2021, is relevant to the jurisdiction of this Court to make orders as to extension of time.

[27] As counsel for the Appellant notes "*Section 16 primarily addresses Notice of Appeals and the time limit to file the same, however sub-section 3 provides that the power to enlarge time is applicable to all time limits within the Act".*

[28] It would have been ideal for the amendment to specifically reference the Rules which it does not. However the amendment does extend the previous provision which solely addressed filing of Notices of Appeal to *"any provision that imposes a time limit herein"*. This is interpreted as including the Rules by virtue of Section 7(2) of the Interpretation Act, Cap 1 of the Laws of Belize. Section 7(2) provides "*Every schedule to and table in any Act and any notes to such schedule or table shall be construed and have effect as part of such Act*". The Court of Appeal Rules are the Schedule to the Act. "*Herein*" would be interpreted to mean any time limit in the Act or Rules.

[29] The argument before us was whether the law as presently stands would be applicable to the matters occurring prior to the amendment.

[30] The Appellants ask that the Court find that the amendment was procedural and as a procedural amendment has a prospective effect so as to be applicable to any matter heard after the amendment was enacted. To this effect, they have submitted the case of ***Braithwaite and Taitt v The State***[2] wherein the Court of Appeal of Trinidad and Tobago considered a similar issue.

[31] The court notes **at para 29** of ***Braithwaite*** that the court states "*it is sufficient that at the time of the trial the law permitted the admission…*". This court accepted the *dicta* of Bereaux, JA in ***Braithwaite*** in ***Calman Hall & Tifarrah Tench v the Attorney General of Belize***[3] finding that,

[2] TT 2009 CA 42

[3] Claim No. 476 of 2021

"*… the amendment is of a procedural nature and in any event, is prospective in its effect though applicable to a prior factual situation*."

[32] It is noted that in ***Aikman*** the court made reference to the "*merely procedural step of serving the Notice of Appeal*".

[33] The Respondents submitted in response that no jurisdiction vested in the Court of Appeal at the time the Notice of Appeal was lodged and was to be served that permits this court to extend time.

[34] However, the authorities substantiate, and I agree, that in these circumstances it is the time at which the authority is being exercised which determines applicability. This court therefore accepts that **section 16(3)** applies in the instant case and the court may exercise its discretion and enlarge the time limits as requested by the Appellants if it deems fit in the interest of justice.

[35] This authority has rendered otiose the Appellant's submissions regarding the application of **sections 12 and 13** as the foundation for jurisdiction to hear such matters. However, I will still consider the applicability of **section 16(3)** and shall nevertheless assess the merits of the Appellants' initial submissions concerning those sections and the infringement of the right to access in relation to the time limitations set by the Court of Appeal Act.

Whether the court has jurisdiction by virtue of sections 12 and 13

[36] The Appellants proffered that this Court had been conferred jurisdiction to grant an extension of time for service by virtue of **section 13 of the Court of Appeal Act** as a matter necessarily incidental to the hearing and determination of the appeal. That while section 12 does not confer any jurisdiction on the Court it is relied on to govern the proceedings. That such application may be made in accordance with the procedure provided for such extensions and orders under the laws of the Court of Appeal of England because of the absence of any relevant special provision in the Act.

[37] The Respondents have contended that there is no such jurisdiction conferred by the aforementioned sections. They referenced from the cited decision of ***Sharryn Dawson v Central***

Bank of Belize[4] the dicta by Carey JA in the referenced case ***Tommy Crutchfield and In the Matter of an Application for a Writ of Habeas Corpus Ad Subjiciendum***[5] wherein the learned Justice stated, "*it would require very clear words to cede the authority of the Belize Parliament to the UK Parliament. It is not the case that whenever the law in the United Kingdom changes, a like occurrence manifests in Belize*." The Court of Appeal in ***King's Company Limited vs. Santa Ana Development Ltd.***, ***Registrar of Lands and Attorney General***[6] affirmed the applicable law towards the issue to be what was expressed and meticulously set out in the ***Sharryn*** decision.

[38] The court in ***Sharryn*** ultimately held that there was no jurisdiction to extend time to serve the notice, which conflicted with the earlier decision of ***Aikman v The Central Bank***[7].

[39] The Appellants submitted that the ***Sharryn Dawson*** and ***King's Company Limited*** decisions were ill founded on account of the learned Justices' failure to appreciate that pursuant to **section 13 of the Court of Appeal Act,** the court has been fully seized of jurisdiction in the matter where a notice of appeal has been filed.

[40] However, section 13 specifically provides that the hearing and determination for all purposes of and incidental to any appeal is "***subject to rules of court***". It is the rules of court that prescribe the time limit for service and made no provision for extension.

[41] On these facts sections 12 or 13 would not have assisted the Appellant.

Re Filing / Serving

[42] It is worth noting Order **II Rule 3(4)** states:

> "*In exceptional circumstances, the Court having power to hear and determine an appeal, may on application extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the Court under this rule.*"

[4] Civil Appeal No. 18 of 2015
[5] Civil Appeal No 7 of 1998
[6] Civil Appeal No. 37 of 2018
[7] Civil Appeal No 12 of 1992

[43] The Act clearly provides for jurisdiction to extend time to file an Appeal. The Court therefore would have the power to extend time for the Appellant to file/re-file its Appeal. An effect of that would be a corresponding extension of the time for service.

The time limitation and right of access to the Court

[44] The Appellants have cited a line of authority in support of their argument that the Appellant's right to access to the court and right to a fair trial is infringed by the time limit. The case of ***Pomiechowski v District Court of Legnica, Poland and another; Rozanski v Regional Court 3 Penal Department, Poland; Lukaszewski v District Court of Torun, Poland; Halligen v Secretary of State for the Home Department***[8] was referenced wherein Lord Mance asserts that article 6.1 of the the Convention for the Protection of Human Rights and Fundamental Freedoms[9] requires that it [being the extradition proceedings] be free of limitations impairing the very essence of the right. At **para 37** Lord Mance asserts:

> *"The previous judicial expressions of concern are eloquent about the potential and actual unfairness of the position in which prisoners find themselves in trying to meet the statutory requirements, with such aid as the prison legal services department or legal advisers can, under difficult conditions, provide. The problems of communication from prison with legal advisers in the short permitted periods of seven and fourteen days are almost bound to lead problems in individual cases…."*

[45] While the principle is plausible in any context as 7 days is indeed a short period, upon reading the judgment it is clear that the court took the stance of inferring jurisdiction to extend the time limit in the special context of a class of appellants whose individual circumstances pertaining to extradition proceedings place them in a position where their very right of access to the court is endangered by the likelihood of challenges related to their particular circumstances. This belief is substantiated in Lord Mance's assertion at [37] that:

[8] [2012] 1 WLR 1604

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969)

"I am not persuaded that the interests of finality and certainty outweigh the interests of ensuring proper access to justice by appeal in the limited number of extradition cases where this would otherwise be denied…"

[46] The case of ***Cannonier v The Director of Public Prosecutions; Isaac et Al v The Director of Public Prosecutions***[10] cited by the Appellant, was decided in the context of a capital appeal for which time is of the utmost essence and involved the considerations of various human rights instruments which informed Lord Mance's finding in ***Pomiechowski*** that the interests of finality and certainty do not outweigh the interests of ensuring proper access to justice in the limited cases.

[47] To ask that the principle be applied generally in the circumstances of service of any document I find to be an extension too far outside of its intended scope. The relevant human rights treaties and conventions provide a foundation from which courts may find an inherent jurisdiction to extend the time within specific and limited circumstances. And while I agree that each and every litigant deserves fairness in the process of accessing the court, there is a distinction in the implications and circumstances in the aforementioned cases to what obtains in general.

[48] In the absence of a like basis for distinction, the Court is circumscribed to exercising the discretion it has been given within the bounds of the statute and must be cautious not to fall into the snare of judicial legislating. Therefore, I do not agree that the Appellants' cited authorities give a basis for the court to extend the time on the constitutional right of access to the court and right of fairness. The Appellants have such access to the court provided it complies with the statutory requirements.

[49] Nonetheless, as jurisdiction has been established, as noted in paragraph 34 hereof, the merits of the Appellants' application must now be considered to determine whether the exercise of the court's discretion is justified in the circumstances.

II. Whether the court should grant the Appellants an extension of time to serve the Notice of Appeal by advertisement

[10] (2012) 80 WIR 260

Factors to consider in granting an extension of time

[50] The amendment to **section 16** does not expressly list factors which inform the justification of such exercise of its discretion except to say that it should be "*upon the terms as the justice of the case may require*" and "*in the interest of justice*". It stands to reason then that when all circumstances of the case are considered, an extension must be just in the circumstances. What factors inform justice?

[51] The Appellants submitted that the court should consider that the extension of time be granted on the basis that:

a. the Appellants have a "*high chance of success*" on appeal;
b. the length of delay has not been substantial;
c. the Appellants have good reasons for delay; and
d. no prejudice will be caused to the Respondent.

[52] The Appellants argue that the applicability of these factors is substantiated by the similarity between **section 16(3)** and **Rule 9 of the Court of Appeal Rules, 1968, West Indies Associated States Supreme Court** which states:

> *Subject to the provisions of regulation 28(2) of the Federal Supreme Court Regulations (relating to the time within which an appeal may be brought in a capital case), and to Order 64, rule 6 of the Rules of the Supreme Court, the Court may enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the court may direct a departure from these Rules in any other way where this is required in the interest of justice."*

[53] The Appellants rely on the decision of ***C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.***[11], wherein the court states at **paras 48 and 49**:

[11] [ECSC] [2012] ECSC J0319-1

48. "*…The well established criterion for an application for extension of time to be made promptly, and for the length of delay to be taken into account where the application relates to an appeal, obviously is reflected in and/or arose from the stipulated requirement under the old Rules that the application should be made no later than one month beyond the deadline for filing the appeal. The requirement for the reason for the delay to be satisfactory, no doubt is reflected in, or originated from the requirement in the old Rules that the affidavit should contain substantial reasons for the application. The criteria focusing on the chances of success of the appeal if the extension of time is granted emanated from the demand under the old Rules that the grounds of appeal should prima facie show good cause. That the degree of prejudice to the respondent, must be considered stems from the Court having to access the "justice of the case" for both parties and giving directions in the interest of justice under the Court of Appeal Rule Having regard to the authorities cited by Sir Dennis Byron C.J. in* ***Rose v Rose****, it is obvious that this same criteria guided his approach in considering the application for extension of time to appeal after the introduction of CPR 2000. In assessing the prejudice to the respondent, the court would, following the introduction of CPR 2000 in a manner of speaking, be giving effect to some of the matters to be taken into account under the overriding objective*.

49. Under the old rules, timelines were established for making applications to extend the time for applying for leave to appeal and filing notices of appeal. That timeline was one month from the stipulated deadlines in the Rules or Statute. Noticeably, no such timeline existed in the old Rules for applications for extension of time in the High Court. It also does not exist in any rule under CPR 2000. I can see no reason why the well-established principles governing applications for extension prior to CPR 2000 should be disregarded."

[54] The Respondent's submissions support the same factors to be considered by the Court in exercising its discretion except using the terminology "no arguable appeal". I am of the opinion in the exercise of our discretion more than "arguable" is required.

[55] The Court of Appeals in the region and Caribbean Court of Justice have considered the principles to be applied when enlarging time. Decisions involving time to appeal and granting of special leave to appeal are instructive. The Caribbean Court of Justice (CCJ) in ***Arnold Sankar v Guyana Rice Development Board*** [2019] CCJ 11 (AJ) reiterated the guidelines of "*length of the delay, reasons for the delay, chance of success and degree of prejudice*". In that decision the CCJ also referenced ***Kampta Narine Called Mahon v Gupraj Persaud*** [2012] CCJ 8 (AJ) which highlighted the importance of consideration of the merits of the appeal "*The public interest in the swift administration of justice is of great importance, but the length of and the reason for the delay should be weighed against the possible merits of any appeal. Therefore despite the absence of any plausible explanation for the delay in hearing an appeal, the court should have proceeded to assess whether and to what extent, refusal of an extension of time might result in a miscarriage of justice*".

[56] ***Sankar*** also noted at paragraph 13 "*In the case of James Ramsahoye v Linden Mining Enterprises (LME), Bauxite Industry Development Company Limited (BIDCO) and National Industrial Commercial Investments Limited (NICIL), Burgess JCCJ examined this Court's jurisprudence as it relates to the test to be applied when a party is seeking special leave under section 8. Burgess JCCJ accepted that an application for special leave would be successful if there was a realistic prospect of success. He relied on the judgement of Anderson JCCJ in Barbados Turf Club v Melnyk which was affirmed by Byron PCCJ in Systems Sales Ltd v Browne-Oxley. In his concurring judgement in Ramsahoye, Barrow JCCJ agreed with the observation that the realistic prospect of success test was to be applied to section 8 applications. He added, however, that the appearance of an egregious error of law or possible miscarriage of justice are both, also, indicators of a real prospect of success of the proposed appeal".*

[57] At paragraph 21 "*A court's determination of whether an enlargement of time ought to be granted in the interest of justice is a matter of discretion and must, as noted by the Court of Appeal of Guyana in the Case of Hing v Hing, be conducted on a case by case basis. In that case, the Court of Appeal considered the discretionary power given by Order 1, Rule 8. In the judgment delivered by Chancellor Haynes, he observed:*"

> "*We can, therefore, on this authority, by the joint use of O 1, r 8 and O 2, r 16 (2), effectively restore the appeal in this case and grant the other relief claimed. But O 1 r 8 is to be*

sparingly exercised. In Mustapha Ally v Hand-in-Hand Ins Co, Ltd ((1967), 11 WIR 202), this court acted on "a genuine and unfortunate mistake" on the part of the applicant. Here, there is no question of a mistake at all. But the exercise of this overriding jurisdiction is not in terms so restricted. The rule does not say "the court ... may direct a departure from these rules in any other way in the interests of justice in cases of genuine mistake." So that the jurisdiction may be invoked in other circumstances. The dominant consideration is "the interests of justice". And it is for this court to determine in every individual case as it arises, whether recourse to the rule is demanded. It is neither possible nor desirable to attempt to define or to categorise the circumstances which can or will do so. This court's sense of justice must be its guide. But it must be the interests of justice according to law. This consideration includes not only the interests of the dissatisfied litigant who wishes to pursue a right of appeal, but also those of the successful one in the satisfaction of the judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation. We have to balance the two competing interests, bearing in mind the third. And in so doing it is not irrelevant to recognise that a right of appeal is not one to which a litigant is entitled as a matter of natural justice. It is a statutory right exercisable subject to compliance with the conditions prescribed by the statute or statutory instrument. The litigant who does not comply and so is unable to stand in this court and challenge the judgment of the court below, is not thereby deprived of a right to do so. What has happened is that he has not qualified to exercise the right and a legal bar arises as a result of such non-compliance. (emphasis mine)"

"We accept these principles. Thus, in arriving at a determination as to what is required in the interests of justice, a court should balance the interests of the dissatisfied litigant who wishes to pursue a right of appeal, on the one hand, with the interests of the successful litigant who wishes to have the satisfaction of the judgment in his favour without undue delay, on the other hand. In addition, the court should have regard to the important administrative principle against the undue protraction of litigation."

[58] There is sufficient authority to support the Court in determining whether an extension should be granted to consider (i) the length of delay; (ii) reasons for delay; (iii) the prospects of success on an appeal; and (iv) the degree of prejudice to the parties.

Length of Delay

[59] This factor relates to the promptness with which the application for an extension of time to serve was brought, having due regard to the deadline. Prompt will always depend on the circumstances of the case. The court has considered the Respondent's authority ***Paulette Richards vs. Orville Appleby*** [12] wherein the court had before it a delay of 42 days in filing an appeal where the time limit was 14 days.

[60] ***Richards*** is distinguishable on the grounds that the matter in this case is the service of the appeal which faces different considerations before it. The vicissitudes of service vary from the filing of the notice and the court is minded to consider all the circumstances of the case before it which includes the shorter time limit and the reasonable efforts made to comply with the time. n ***Richards***, there was a "*misapprehension on the part of counsel who conducted the trial, of the time limited by law for the filing of an appeal from the parish judge's decision*." Consideration of the length of delay and reason or the delay must not be treated as a demarcated process but must have fusion and inform the other.

[61] The first Notice of Motion seeking an extension was filed on 14th May, 2021, within 10 days of when it should have been served. Accepting that the application may be made after the expiration of the time appointed for service, the Court finds that the Notice was not filed so late after the deadline as to be considered outside the ambit of promptitude. The court is satisfied that the Appellants' failure to serve within the requisite timeframe tried to seek an extension within a reasonable time after the deadline elapsed.

[12] JM 2016 CA 67

Reasons for the Delay

[62] It must be satisfied on the facts that the Appellants had good reason why the service was not effected within the 7 days. The Court of Appeal in **The Attorney General of Trinidad and Tobago v Miguel Regis**[13], stated that what is required is a good explanation not an infallible one and "*whether such an explanation has been shown is a question of fact to be determined in all the circumstances of the case, and is therefore a matter of judicial discretion*" therefore, "*when considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection*"[14].

[63] The reason set out by the Appellant in their evidence is that they had reasonable belief that the Respondent evaded service. This includes, as set out in the Appellants' submissions and affidavits that they attempted to serve on various occasions by three process servers and one police officer and all attempts were rendered futile. While failure in the face of reasonable effort does not directly lead to the conclusion that the Respondent was evading service, it does provide ample context for the Appellants' inference.

[64] Being unable to serve the Respondent personally, the Appellants eventually served the Respondent's counsel on the 19th day of August, 2021. In the affidavit of Olivia Villanueva, the Respondent avers that she was never approached for personal service in the week of April 26th nor the week thereafter. The Respondent opposes that service ever occurred which includes service on Counsel as sworn. This contradicts our understanding of the representation to the Court. Whether or not the Respondent was eventually served at some point, it is undisputed that no service occurred within the seven days stipulated by **Order II Rule 4(2)** for which the good reason must substantiate. I find that the Appellants did substantiate the reason why service not effected within the 7 days by their evidence.

[65] Accordingly, the Appellants had a good reason for the failure to serve and they did exhaust a reasonable measure of efforts to effect such service personally on the Respondent.

[13] Civil Appeal No. 79 of 2011
[14] In Re The Partition Ordinance Chapter 27 No.14...Rawti a/c Roopnarine, Civ Appeal 52 of 2012.

Prospects of Success

[66] I agree with the submissions of the Respondent that in circumstances of exercising its discretion and considering all relevant circumstances this includes the merit of the appeal.

[67] The grounds submitted by the Appellants as the foundation of the appeal are that:

i. The learned Acting Chief Justice erred in fact and in law and misdirected herself when she made an award of damages in the sum of five million six hundred and thirty-nine thousand dollars ($5,639,000.00):

   a. In failing to appreciate that the effective date of the valuation was February 2008, when the contract was completed; and

   b. Without deducting the contract purchase price paid by the Claimant.

ii. The learned Acting Chief Justice erred in law when she made an award of interest at a rate of six per cent (6%) subsequent to the delivery of her written judgment.

iii. The learned Acting Chief Justice erred in fact and misdirected herself when she failed to consider the totality of the evidence presented, in that the Court found that there was no cross examination of Talbert Brackett, when cross examination did in fact take place.

iv. The judgment is against the weight of the evidence.

[68] On the first ground, the parties both submitted authorities on whether Her Ladyship assessed the market value of the property at the correct point in time and applied the deduction of the contract price under the contract. The Appellants further contended in their Supplemental Submissions that damages were an inappropriate remedy. The Respondent maintains that the judge correctly applied the principle, being that the market value of the property should be assessed at the contractual time for completion less the contract price and submitted authority in support on which the learned judge relied - ***Emy Gilharry Ramirez vs. Attorney General***. The Respondent further submitted that the Appellants did not raise the point as an issue in the court below and

submitted no contrary authority. On the matter of the contractual price to be deducted, the Respondent admits that this was not ordered and stated '*for the purposes of disposing of this matter quickly the Respondent is prepared to settle with the Appellants and accept that the contract price of $26,657.00 should be subtracted from the assessed value of $5,639,000 … in this way, if these are the only arguable points the appeal can be quickly disposed of to save judicial time.''*

[69] What the Respondent essentially concedes (and the Trial Judge had noted but failed to effect) is that the contract price should have been deducted. However, the appeal cannot be "*quickly disposed of*" unless there is an appeal; and it should be accepted that this ground of the appeal would be successful.

[70] In respect of the second ground, it appears that the relevant issue is that the learned judge made the award of 6% interest subsequent to the delivery of her written judgment. In this regard, the Respondent contends that on pre-judgment interest, that the court had the discretion to award interest at the rate of 6% per annum, pursuant to **Section 166 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize**. The Respondent contends that this was an oversight by the court in omitting the interest, but the court was not *functus* and able to include interest within the perfected order. Further submissions were made on the issue of the draft Order and email correspondence. However, that is not before us in this application. It cannot be said that the ground has no prospect of success.

[71] Ground 3 and 4 can be assessed together as they relate to the same point. The Appellants aver that Her Ladyship erred in fact and misdirected herself when she failed to consider the totality of the evidence; finding that there had been no cross examination of Talbert Brackett when cross examination did in fact take place. The judgment does state plainly that he was not cross examined. The entire statement of the judge at para [9] of the judgment was: "*I note the objections to the value of this property as articulated by Counsel for the Defendants in their submissions on this application. It is unfortunate that the Defendants did not seek to cross-examine Mr. Brackett on his report and have him address these concerns or any challenges they wished to make to his report…*"

[72] A review of the transcript confirms Mr. Brackett was in fact cross examined. A litigant must have certainty when a judgment has been given that all relevant evidence that he has put forward has been duly considered in the court's journey to its decision and the evidence adduced in cross-examination is not to be excluded.

[73] The Appellants have argued that the learned judge did not give any weight to the evidence of Talbert Brackett on cross-examination wrongfully, believing there was none.

[74] The Respondent pointed out the Appellants did not present any alternate evidence and that is a reasonable point. However, the Appellants would have had the opportunity through cross examination to elicit evidence that could be material to the Judge's decision. Had the trial Judge considered and dismissed it, overturning her evaluation of the evidence may have been difficult, but there may be merit in the argument as to the effect of the trial Judge having not evaluated it at all.

Prejudice

[75] In considering the issue of prejudice, the court should balance the various factors and weigh the implications of its decision on both parties. If the application is granted, the Respondent has submitted that prejudice is occasioned in her not having use and/or access to her property since the time of acquisition and thus denying her of the benefit and fruits of her judgment as ordered by the court below.

[76] If the extension of time is refused, the Appellants are denied the opportunity to have the grounds of their appeal ventilated by the court. In light of all the circumstances to which this court must have regard, including the interest of the administration of justice, I find that the prejudice that would be occasioned to the Appellants in striking out the motion (particularly given their efforts to serve their Notice of Appeal within the stipulated time) tips the scale in their favour.

[77] Order

1. The Appellant is granted an extension of time for the service of the Notice of Appeal to 19th August 2021.

2. No order as to costs.

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WOODSTOCK-RILEY, JA

MINOTT-PHILLIPS, JA

[78] I have had the privilege of reading, in draft, the reasons of my sister, Woodstock-Riley, JA. I agree with her reasons and the orders made and have nothing to add.

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MINOTT-PHILLIPS, JA

FOSTER, JA

[79] I have read the judgment of my of my learned sister, Justice of Appeal Woodstock-Riley, and I concur.

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FOSTER, JA