[2018] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

REVENUE COURT APPEAL NO.3 OF 2015

BETWEEN	**MILTON BROWN t/a KARNACK HARDWARE**	**APPLICANT**
AND	**THE COMMISSIONER GENERAL (formerly The Commissioner of Taxpayer Appeals)**	**RESPONDENT**

IN CHAMBERS

Ms. Karen O. Russell for the Applicant

Mrs. Cecelia Chapman Daley and Ms. Maxine Johnson for the Respondent

Heard: 18th & 24th January, 2017 & 18th May, 2018

Revenue Appeal–Time within which to bring Appeal in Revenue Court expired - Application for extension of time to file Appeal refused - Application for leave to Appeal to the Court of Appeal - Principles to be considered in granting permission to Appeal to the Court of Appeal.

Cor: Rattray, J.

[1] On the 23rd June, 2015, there were two separate Applications filed on behalf of the Applicant, Mr. Milton Brown, before the Revenue Court in respect of Revenue Court Appeal Nos. 2 and 3 of 2015. Both Applications sought an extension of time within which to Appeal to the Revenue Court, the decisions of the Respondent, made on the 30th December, 2011, which imposed additional Income Tax in the sum of $9,612,247.44 and General Consumption Tax in the sum of $7,012,556.48 on the

Applicant for the year 2007. After hearing the submissions of the parties, and considering the evidence and the Authorities cited, I orally refused both Applications.

[2] Subsequent to my oral ruling on the 23rd June, 2015, I set out my reasons for refusing the Applications in writing in these matters. For convenience however, only one Judgment was delivered with respect to the two Applications, in light of the factual similarity of the evidence in both matters. Further, only one set of submissions had been advanced by the Applicants and no step had been taken, nor any Application made for the consolidation of both Applications for Extension of Time within which to Appeal to the Revenue Court. No objection was raised by Counsel for either side as to this approach taken by the Court.

[3] In the instant Application filed on the 1st July, 2015, the Applicant is now seeking, Leave to Appeal to the Court of Appeal, the decision made on the 23rd June, 2015, in respect of Revenue Court Appeal No. 3. It is however, my understanding that although a separate Application was not filed in respect of Revenue Court Appeal No. 2, the ruling herein is applicable to both Revenue Court Appeal Nos. 2 and 3 of 2015.

[4] The grounds relied on by the Applicant are outlined as follows:

a) Counsel's failure to make the Application at the time the Order was granted;

b) The grounds set out in the draft Notice of Appeal annexed hereto which have a realistic chance of success;

c) The learned Judge erred in law in dismissing the Applicant's Application;

d) The Application had been promptly made;

e) The Applicant would be without redress and/or remedy if leave to Appeal is not granted;

f) The Honourable Court has the jurisdiction to extend time to Appeal.

[5] Counsel Ms. Russell for the Applicant, at the outset submitted that in considering an Application for Extension of Time, this Court was bound to consider the factors set out in the Court of Appeal decision of **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**, Motion No 12/1999, a judgment delivered on the 6th December, 1999. There, Panton JA (as he then was), declared the factors for consideration to include the following: -

> *"(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 time table, 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."*

She also relied on the Court of Appeal decisions of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ. 21, and **Paulette Richards v Orville Appleby** [2016] JMCA App 20, which she submitted had applied the aforementioned factors.

[6] She further submitted that, although the delay in making the Application to Extend Time to File Appeal may have been inordinate, the Court ought not to stop at that point, but should go on to consider the other factors outlined in the **Leymon Strachan** decision. In support of this argument, she referred to the decision of **Paulette Richards v Orville Appleby**, where at paragraph 20 of his Judgment, F. Williams JA posited: -

> *"To my mind, this period of delay might fairly be regarded as inordinate. However, that, by itself, is insufficient to warrant a dismissal of the appeal; and so*

> *it is necessary to discuss the other factors outlined in the Leymon Strachan case."*

[7] The Applicant's Counsel argued that the delay in this matter without more, was not determinative in deciding whether the extension of time should be allowed. She further argued, that the sole reason for refusing to grant the extension of time was the delay, as in her view, the decision of the Court seemed to place great emphasis on the delay of her client. Counsel then referred to the decision of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, where at paragraph 69 of her Judgment, McDonald-Bishop JA (Ag) (as she then was) opined that: -

> *"The delay on the part of the appellant to comply with the relevant rules and the case management orders of the court as well as to apply for an extension of time to do so was inordinate in all the special circumstances of this case. The length of the delay is a consideration that strongly militates against the appellant's application for extension of time and variation of the case management order. However, this finding, while being accorded significant weight, is not taken as being determinative of the ultimate question whether the appeal should be allowed to proceed. Another important issue for consideration is whether the appellant has a good explanation or excuse for the delay."*

[8] Ms. Russell also advanced the argument that the Court failed to consider whether her client had a good explanation for the delay. She referred to paragraphs 46 to 51 of the Affidavit of Milton Brown in Support of Notice of Application to Extend Time to File Appeal, filed on the 21st January, 2015, which she submitted gave adequate reasons for the delay. Those paragraphs read as follows: -

> *"46. That based on the apparent failure of my Attorney-at-Law and the TAD to arrive at any meaningful settlement or decision as to the way forward and/or the issues surrounding my appeal my Accountant once again intervened by seeking the assistance of the Minister of Finance by way of letter dated 31st day of July, 2013 which was delivered on the 8th day of August, 2013...*
>
> *47. That during the intervening period from the receipt of the Notice of Decision and while we awaited a response from the Minister of Finance I was issued with summonses to appear before the Resident Magistrate Court for the Parish of Saint Ann holden at Saint Ann's Bay on all these unresolved matters.*
>
> *48. That my Accountant wrote another letter to the Minister of Finance dated the 16th day of September 2013 as there was no response to the first...*
>
> *49. That by letter dated August 19, 2014 the Minister of Finance finally responded to my Accountants and advised that I take the matter before this Honourable Court....*

> *50. That since I have always maintained my intention to defend, appeal and ultimately prosecute the decision as contained in the Notice of Decision of the TAD I proceeded to my Accountant who advised me to obtain the services of an Attorney-at-Law who has some experience in tax matters as by this time my previously instructed Attorney-at-Law had succumbed to her illness during the intervening periods.*
>
> *51. That I had challenges putting together the relevant documents to instruct my Attorney-at-Law of choice and further my Accountant became somewhat unwilling to assist me with his working papers and correspondence as he maintained that I instruct an Attorney-at-Law of his choice."*

[9] Counsel Ms. Russell went on to contend that even if the Court does not consider the reasons for the delay to be good ones, the justice of the case should be examined. She then referred the Court to paragraph 25 of the Judgment of F. Williams JA in the **Paulette Richards v Orville Appleby** case, to support her submission, where the Learned Judge of Appeal opined that: -

> *"In any event, however, even if I should eventually be found to be incorrect in this conclusion, it is to be remembered that, at the end of the day, what is required on the basis of the principles outlined in the Leymon Strachan case is that the justice of the case be examined even where the explanation for the delay may not be a good one."*

[10] Similarly, she relied on paragraph 84 of the Judgment of McDonald-Bishop JA (Ag) in **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, where the Learned Judge of Appeal expressly stated that: -

> *"I must point out, however, that even though the excuse for the lengthy delay is not a good one, the authorities have said that the court is not bound to refuse the application. It is but one of the factors to be taken into account in weighing what the interests of justice require. Therefore, my finding that there is no good explanation for the delay is not treated as being conclusive of the issues for determination, albeit that it is, indeed, a weighty one."*

[11] Furthermore, Counsel strenuously argued that her client always had the continued intention to pursue his Appeal, and the Court ought not to have found otherwise. She maintained that the steps taken by her client might not have been the most informed, but that he always had the continued intention to defend, and upon receiving the Notice of Decision, he took positive steps, such as seeking the assistance of an Attorney-at-Law to properly guide him with the process.

[12] Ms. Russell also maintained that the Court failed to consider the merits of her client's Appeal, as there was no mention of such merits in the written Judgment of the Court. She submitted that the Court must consider the merits of the Appeal in deciding the question of whether an extension of time should be granted, and if there was no merit in the Appeal, then the Court should rightly refuse to grant the extension of time within which to appeal. Counsel contended that the Notice of Appeal was not considered by the Court, which outlined the merits of the Appeal. As such, she submitted that the merits of her client's Appeal were crucial factors to be considered by the Court, and a failure to consider same was detrimental to her client. In support of this position, she referred the Court to **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** case, where at paragraph 92, McDonald-Bishop JA (Ag) emphasized that: -

> *"Another relevant and substantial consideration in my deliberation is the merits of the appeal. By this appeal, the appellant seeks to have the court address the questions of the learned trial judge's interpretation of the CPR and whether she exceeded the jurisdiction conferred on her by the Act in making the orders she did in favour of the respondents. It has been contended on behalf of the appellant that there is an arguable appeal on the merits and so the appellant should not be deprived of the opportunity to present the appeal."*

[13] She also referred the Court to paragraph 30 of the Judgment of F. Williams JA in **Paulette Richards v Orville Appleby**, where he indicated that "*The applicant must be regarded as having successfully crossed the hurdle of demonstrating that she has an arguable case on appeal…"* In reliance on the foregoing, Counsel submitted that "an arguable case" is the hurdle that her client had to cross, and he did just that by outlining the merits of his Appeal in his evidence.

[14] In concluding her submissions, Counsel Ms. Russell advanced the argument that the Court failed to also consider the likely prejudice that her client would face, if the extension of time was not granted. She submitted that mere administrative breaches such as the delay should not cause her client to be denied his right to Appeal. She argued that if leave to Appeal is not granted, her client cannot proceed any further as there was no other recourse available to him. She urged the Court to consider what

McDonald-Bishop JA (Ag) stated at paragraph 100 of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** case: -

> *"The fact that the Respondents may be entitled to monetary compensation, including interest…while relevant, is not taken as a complete or sufficiently potent response to the argument of the Respondents that they are being prejudiced by the delay…"*

[15] In her reply, Counsel Mrs. Chapman Daley for the Respondent agreed that the decision of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, was very instructive and relevant to the circumstances of the Application. She however, argued that that case supported her contention that leave to Appeal ought not be granted to the Applicant. In support of this submission, she referred to paragraph 119 of the Judgment of McDonald-Bishop JA (Ag) where she posited that: -

> *"At the same time, the court should also be concerned with challenges posed to its authority, by the failure of litigants to comply with its rules, directives and orders. There is a live and dangerous threat to the rule of law when the court's authority is undermined by inexcusable and persistent disregard for its rules and orders. The court is also concerned with what is fair and just to the parties to the proceedings as well as to other litigants who are standing in line to access the limited resources of the court, the most scarce of which is its time."*

[16] She further submitted that indeed the Court spent considerable time considering the delay of the Applicant, which the Court ought to have done, as the delay of the Applicant was a very important factor for its consideration. However, Mrs. Chapman Daley went on to submit that the delay was not the only issue considered by the Court in arriving at its decision.

[17] In relation to the reasons put forward for the delay, she argued that the Court did in fact consider the explanation submitted by the Applicant, and formed the view that the explanation was not credible.

[18] Mrs. Chapman Daley maintained that the Court was correct in forming the view that the Applicant had no continuing intention to pursue his Appeal. She argued that the way to show a continued intention was by the filing of a Notice of Appeal, within the stipulated time period, and not by the writing of letters. The mere writing of letters she

maintained did not show an intention to pursue an Appeal. They reflected instead an intention to avoid or delay the Appeal.

[19] In relation to the merits of the Appeal, Counsel referred to paragraphs 51-53 of the Affidavit of Milton Brown in Support of Notice of Application to Extend Time to File Appeal (supra), where he averred: -

> *"51. That I had challenges putting together the relevant documents to instruct my Attorney-at-Law of choice and further my Accountant became somewhat unwilling to assist me with his working papers and correspondence as he maintained that I instruct an Attorney-at-Law of his choice.*
>
> *52. That in November 2014 I provided some of the documentation and correspondence and the available source records to my Attorney-at-Law, Karen O. Russell (hereinafter referred to as 'my Attorney-at-Law') with a view to have her reconstruct, put together and extrapolate the true reflection of the events as they occurred and mount an appeal to this Honourable Court.*
>
> *53. That even at the date herein my Accountant is yet to forward certain documents to me but I have instructed my new Attorney-at-Law to delay no further as I understand time to be of essence in dealing with these matters."*

[20] In reliance on the foregoing portions of the Applicant's Affidavit, Counsel Mrs. Chapman Daley submitted that the Applicant admitted that he did not have the documents necessary to file his Appeal, which would definitely speak to the merits of his Appeal. She insisted that the merits of the Appeal, were in fact considered by the Court and there was no omission in that regard.

[21] Furthermore, Mrs. Chapman Daley argued that the Draft Notice of Appeal was not evidence of the merits of the Appeal, as the mere attaching of a document does not make it evidence. Counsel relied on the decision of **Shirley Beecham v Fontana Montego Bay Ltd t/a Fontana Pharmacy** [2014] JMSC Civ. 199, to support her submissions. For her part, Counsel Ms. Russell, took no issue with the principle adopted from the **Shirley Beecham** decision. She argued however, that the merits of the Appeal were in fact considered in the Affidavit of Milton Brown in Support of Notice of Application to Extend Time to File Appeal, and not just in the Draft Notice of Appeal.

[22] On the issue of prejudice, Mrs. Chapman Daley argued that prejudice was not one sided, as Counsel Ms. Russell would want the Court to believe. She further argued

that both parties ought to abide by the timelines set, whether by the Court or by legislation. She submitted that the Respondent had indeed been prejudiced with the numerous delays caused by the Applicant's inaction. The Revenue, she submitted must have certainty, as to when it can collect the debt, which had been due and owing for some years now.

[23] Having considered the respective submissions by Counsel on behalf of the parties, I do not accept the submissions of Counsel Ms. Russell, that the sole or main reason for refusing her client's Application was his delay in approaching the Court. The delay was of course an important factor, but not the determining factor. The Court cannot, and did not in this case consider only the delay without more. It had to carry out a balancing exercise of the rights of the respective parties, bearing in mind the factors outlined in the **Leymon Strachan** case. This position was highlighted at paragraph 12 of my decision, where I indicated that: -

> ***"I am satisfied that on the material before me, the delay in making the application for an extension of time within which to appeal is inordinate, as conceded by the Appellant's counsel. But that by itself is not enough to warrant the refusal of the grant of the Order sought. Any discretion to be exercised by the Court must be applied based on the particular circumstances of each case**."*
>
> [My emphasis]

[24] Moreover, while I agree with Ms. Russell that the decision of the Court, placed some emphasis on the delay of her client, the Court did in fact consider the explanation proffered by her client. Having considered the explanation put forward, the Court was not convinced that it was credible. This was highlighted at paragraph 15 of the decision, which stated that: -

> *"…**I am satisfied after considering all the evidence before me that no credible explanation has been given for the delay in filing an appeal**…"*
>
> [My emphasis]

[25] Furthermore, I am unable to agree with Counsel Ms. Russell, when she contended that her client had a continuing intention to pursue his Appeal. Such intention was not reflected in or by his conduct. I am satisfied, on the evidence that the Applicant

did not have a genuine continuing intention to pursue with his Appeal, because despite being notified on numerous occasions, as to his right to Appeal, and the procedure to Appeal, he failed to expeditiously take any steps in that regard. His failure to act was his own choice and he must accept the consequences which flow from such failure. The dicta of Panton P in the Court of Appeal decision of **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** SCCA No 3/2008, a judgment delivered on the 11th April, 2008, is instructive in this regard. At page 11 of that Judgment, the learned President issued a warning to litigants and their Attorneys-at-Law *"…that they ignore the Civil Procedure Rules at their peril."* In the instant matter, the Applicant by failing to comply with the time frame for filing his Appeal to the Revenue Court, despite being advised of the procedure is the author of his own misfortune.

[26] I have carefully read and considered the decisions of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, and **Paulette Richards v Orville Appleby**, relied on heavily by Counsel Ms. Russell. I accept that this Court is bound by those decisions. I am satisfied that both decisions outline some of the factors that a Court ought to bear in mind, in exercising its discretion as to whether or not to grant an extension of time. Each case must however, be decided on its own particular facts. In the present matter, this Court carefully examined the relevant factors highlighted in both decisions, before dismissing the Applicant's Application for an Extension of Time within which to Appeal to the Revenue Court.

[27] Furthermore, contrary to Ms. Russell's submissions, this Court did in fact consider the merits of her client's Appeal. At paragraph 12 of my decision, I opined as follows: -

> *"**Any discretion to be exercised by the Court must be applied based on the particular circumstances of each case**."*
>
> [My emphasis]

[28] Having found that there was inordinate delay on the part of the Applicant in making his Application for an extension, and after considering the explanation for the

delay, the Court went further to consider the circumstances of the Applicant's case, and in particular the merits of the Appeal, and the issue of prejudice to the respective parties.

[29] The contention as raised by the Respondent in the Notice of Decision dated the 30th December, 2011, was that the Applicant was under-reporting the income from his business. The Applicant however, indicated that the surpluses in his accounts were from loans, from persons identified as investors, who injected money into his business.

[30] In order to prove these loans, the Applicant exhibited two letters to his Affidavit filed on the 21st January, 2015. The first letter (exhibit **"MB003"**) dated the 20th July, 2009, came from Mr. Patrick Blagrove, who stated that he became a silent partner in the Applicant's business, and from time to time he made capital injections totalling Three Hundred Thousand United States Dollars (US$300,000.00) to fund the operation. In the second letter (exhibit **"MB004"**) dated the 29th June, 2009, from Mr. Kenneth Williamson, he indicated that during the period of October, 2006 and the year 2007, he advanced the sum of Thirty-Three Million Three Hundred and Fifty Thousand Jamaican Dollars (JA$33,350,000.00) to the Applicant, being the equivalent of Four Hundred and Eighty-Three Thousand United States Dollars (US$483,000.00), to assist in his new business venture.

[31] I am satisfied that these letters, in and of themselves, cannot be credibly relied on by the Court. The said correspondence makes no mention of any Loan Agreement, the terms of any repayment period, nor the interest rate to be paid on the said loans. Furthermore, the said loans were never included in the Applicant's Financial Statements. In my view, one would have expected, that with such large sums of moneys being invested, a businessman like the Applicant, would have ensured that the Loan Agreements with his investors were properly recorded in writing, so as to protect not only his interests, but also those of his investors.

[32] Furthermore, the Respondent in the Notice of Decision stated, that the Applicant had submitted copies of twenty-two encashed cheques in United States Dollars from

account holder Mr. Kenneth Williamson and Ms. Hyacinth Williamson, in the amount of US$39,500.00, as well as copies of three Certificates of Titles previously owned by Mr. Kenneth Williamson. Unfortunately, these documents were never presented to this Court, by way of Exhibits to substantiate the merits of the Applicant's Appeal. This Court has had no opportunity therefore to have examined those documents, to ascertain whether or not they support the allegations that the said sums were in fact loans from his investors.

[33] I am satisfied that there was no credible evidence presented to the Court that showed any merits in the Appeal, bearing in mind that the Applicant has the burden of proof, on an Appeal to the Revenue Court, pursuant to Section 76(2) of the **Income Tax Act**, and Section 41 (4) of the **General Consumption Tax Act**.

[34] When the Court is asked to exercise its discretion to grant an extension of time, the obligation rests on the Applicant to provide the Court with sufficient evidence to make a proper assessment of the merits of the particular case. The Applicant failed to do this at the time his Applications were heard by the Court. As such, his Appeal clearly lacked merits, and as a result his Applications were refused. This sentiment was expressed by Smith JA in the Court of Appeal decision of **Peter Haddad v Donald Silvera**, SCCA No 31/2003, a judgment delivered on the 31st July, 2007, where he opined that: -

> *"The Court has an untrammelled discretion. This discretion must be exercised judicially. There must be some material upon which the Court can exercise its discretion (see **Patrick v Walker**) [(1969) 11 JLR 303] …"*

[35] The Learned Judge of Appeal also opined that:-

> *"The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules."*

[36] On the issue of prejudice to the parties, Counsel Ms. Russell understandably focused on how her client would be prejudiced, if the relief sought was not granted. However, in balancing the considerations raised by both sides, I am of the view that the

Respondent has been greatly prejudiced by the delay of the Applicant, as the tax collection process has been delayed, which would also have had an effect on public administration. As Mrs. Chapman Daley has indicated, the debt has been on their books for some time. In my view litigation must come to an end, so the parties can move forward, and not have continued uncertainty hanging over their heads.

[37] The factors raised in the **Leymon Strachan** case, and addressed in the decisions of **Paulette Richards v Orville Appleby** and **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, having been considered and applied with respect to the circumstances of the Applicant's case, I am not prepared to accede to the Applicant's present Application for Leave to Appeal to the Court of Appeal.

[38] In light of the reasons outlined above, the Applicant's Notice of Application for Leave to Appeal is refused. Costs are awarded to the Respondent, such costs to be taxed if not agreed.